



*See No 34 for additional brief.*

## TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

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No. 37

ALMON G. RASQUIN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE FIRST DISTRICT OF NEW YORK, PETITIONER

vs.

GEORGE ARENTS HUMPHREYS

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR CERTIORARI FILED APRIL 27, 1939  
CERTIORARI GRANTED MAY 22, 1939



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## 1 In United States Circuit Court of Appeals, Second Circuit

GEORGE ARENTS HUMPHREYS, PLAINTIFF-APPELLEE

vs.

ALMON G. RASQUIN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE FIRST DISTRICT OF NEW YORK, DEFENDANT-APPELLANT

*Statement under rule XIII*

This is an appeal from a judgment entered in the office of the Clerk of the United States District Court for the Eastern District of New York on July 14, 1938, and from the order entered in the office of the Clerk of the said Court on July 13, 1938, granting the motion of the plaintiff striking out the answer of the defendant herein, and directing that judgment be entered herein in favor of the plaintiff, pursuant to Rule 113 of the New York Rules of Civil practice.

The action was commenced by the filing of a summons in the office of the Clerk of said District on or about April 12, 1938.

On April 13, 1938, a copy of said summons and complaint was served personally upon the defendant.

On April 26, 1938, a notice of appearance was filed by Harold St. L. O'Dougherty, United States Attorney for the Eastern District of New York on behalf of the defendant.

On June 7, 1938, the answer of the defendant was served upon the plaintiff.

2 On July 6, 1938, plaintiff moved before the Honorable Clarence G. Galston, United States District Judge for the Eastern District of New York, for an order striking out the answer of the defendant herein, and directing that judgment be entered herein in favor of the plaintiff, under the provisions of Rule 113 of the New York Rules of Civil Practice, on the ground that there was no defense to this suit, and for such other and further relief as to the Court would seem just and proper.

On July 13, 1938, an order was entered in the action, granting the plaintiff's motion for summary judgment under Rule 113 of the New York Rules of Civil Practice.

On July 14, 1938, a judgment was filed in the office of the Clerk of the United States District Court for the Eastern District of New York, directing judgment for the plaintiff in the amount of \$11,181.14, with interest thereon from March 12, 1935, together with costs, as taxed, in the sum of \$21.50.

On October 6, 1938, a notice of appeal from the aforementioned judgment was filed in the office of the Clerk of the United States District Court for the Eastern District of New York.

The names of the parties are as given above. There has been no change of parties or attorneys except that Michael F. Walsh, United

**2 ALMON G. RASQUIN VS. GEORGE ARENTS HUMPHREYS**

States Attorney for the Eastern District of New York has been substituted in place of Harold St. L. O'Dougherty.

**3 In United States District Court, Eastern District of New York**

**L-7625**

**GEORGE ARENTS HUMPHREYS, PLAINTIFF**

*vs.*

**ALMON G. RASQUIN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE FIRST DISTRICT OF NEW YORK, DEFENDANT**

***Notice of appeal to the circuit court of appeals***

Notice is hereby given that Almon G. Rasquin, Collector of Internal Revenue of the United States for the First District of New York, defendant above-named, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from the judgment made and entered in this action on July 14, 1938, and from each and every part of said judgment, as well as from the whole thereof, upon all questions of law and all questions of fact involved therein, and

Take notice further that the said defendant also appeals from and intends to bring up for review the further order of this Court, entered in this action on July 13, 1938, granting the motion of the plaintiff striking out the answer of the defendant herein, and directing that judgment be entered herein in favor of the plaintiff, pursuant to Rule 113 of the New York Rules of Civil Practice.

**4 Dated, Brooklyn, New York, October 6, 1938.**

(Signed) **MICHAEL F. WALSH,**  
*United States Attorney.*

**FRANK J. PARKER,**  
*Asst. U. S. Attorney, Eastern District of New York,*  
*Attorney for Deft.-Appellant,*  
*519 Federal Bldg., Brooklyn, N. Y.*

To:

**PERCY G. B. GILKES,**  
*Clerk, U. S. District Court,*  
*Eastern Dist. of New York.*

**CARTER, LEDYARD & MILBURN,**  
*Attys. for Plff.-Appellee,*  
*2 Wall Street, New York, N. Y.*

**5 In United States District Court, Eastern District of New York**

[Title omitted.]

*Order appealed from July 13, 1938*

The plaintiff in the above-entitled action having made a motion for an order striking out the answer of the defendant herein and

directing that judgment be entered herein in favor of the plaintiff, pursuant to Rule 113 of the New York Rules of Civil Practice.

Now, on reading the complaint, the answer, and on reading and filing plaintiff's notice of motion dated June 29, 1938, returnable July 6, 1938, and admission of service thereof, the affidavit of George Arents Humphreys, sworn to the 24th day of June, 1938, in support of said motion; and the said motion having come on to be heard before Hon. Clarence G. Galston, Judge of the District Court of the United States for the Eastern District of New York, at a Stated Term thereof for motions held at the United States Courthouse, Borough of Brooklyn, City of New York, on the 6th day of July, 1938, and Allin H. Pierce, of counsel, for Carter, Ledyard & Milburn, appearing for the plaintiff, and Frank J. Parker, of counsel, for Michael F. Walsh, Esq., United States Attorney for the Eastern District of New York, appearing for the defendant; and counsel for the defendant having informed the court that the case apparently is controlled by *Hesslein v. Hoey* (C. C. A., 2nd), 91 Fed. (2d) 954, but that the Commissioner of Internal Revenue does not acquiesce therein, it is

Ordered that the plaintiff's motion for summary judgment under Rule 113 of the New York Rules of Civil Practice be, and the same hereby is granted, that the defendant's answer is hereby stricken out, and that judgment is directed for the plaintiff for \$11,181.14, and interest thereon from March 12, 1935, as demanded in the complaint, together with the costs and disbursements of this action.

(Signed) CLARENCE G. GALSTON,  
U. S. D. J.

7 In United States District Court, Eastern District of New York

L-7625

*Judgment appealed from*

The plaintiff having moved this Court for summary judgment in this action pursuant to Rule 113 of the New York Rules of Civil Practice; and said motion having regularly come on to be heard on June 6, 1938; and said motion having been duly granted by an order made by Honorable Clarence G. Galston, United States District Judge, dated July 13, 1938, filed in the office of the Clerk of this Court on July 13, 1938, wherein it was provided that the plaintiff's motion for summary judgment be granted and judgment was directed for the plaintiff in the amount of \$11,181.14 and interest thereon from March 12, 1935; and plaintiff's costs having been duly taxed at \$21.50

Now, on motion of Carter, Ledyard & Milburn, attorneys for the plaintiff, it is

Adjudged that the plaintiff, George Arents Humphreys, of Southampton, Suffolk County, New York, recover of the defendant, Almon G. Rasquin, Collector of Internal Revenue of the United States for the First District of New York, the sum of \$11,181.14, with interest

thereon from March 12, 1935, according to law, together with his costs as taxed in the sum of \$21.50.

Judgment dated this 14 day of July, 1938.

PERCY G. B. GILKES,  
Clerk.

By J. G. COCHRAN,  
Deputy Clerk.

8 In United States District Court, Eastern District of New York

L—7625

*Notice of motion for summary judgment*

SIRS: Please take notice that upon the complaint and answer filed herein and upon the annexed affidavit of George Arents Humphreys verified the 24th day of June, 1938, the undersigned will move this Court at a stated term thereof for motions to be held in Room 214 of the United States Court House, Borough of Brooklyn, City of New York, on the 6th day of July, 1938, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order striking out the answer of the defendant herein and directing that judgment be entered herein in favor of the plaintiff under the provisions of Rule 113 of the New York Rules of Civil Practice, on the ground that there is no defense to this suit, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, June 29, 1938.

CARTER, LEDYARD & MILBURN,  
Attorneys for Plaintiff,  
Office and P. O. Address, No. 2 Wall Street,  
Borough of Manhattan, New York City.

To:

MICHAEL F. WALSH, ESQ.,  
United States Attorney for the Eastern  
District of New York,  
Attorney for Defendant,  
519 Federal Building, Borough of Brooklyn,  
City of New York.

9 In United States District Court, Eastern District of New York

L—7625

*Affidavit of George Arents Humphreys in support of motion for summary judgment*

STATE OF NEW YORK,  
County of New York, ss.:

George Arents Humphreys, being duly sworn, deposes and says:  
1. I am the plaintiff in the above entitled suit and have knowledge of the facts relating thereto.

2. This suit was commenced by the service of a summons and complaint upon the defendant on April 12, 1938. The defendant served his answer by Michael F. Walsh, his attorney, on June 7, 1938.

3. I believe that there is no defense to this suit and that the answer of the defendant should be stricken out and judgment entered in my favor.

4. This suit is brought to recover an overpayment of gift taxes and interest thereon totalling \$11,181.14 for the year 1934 which I, as plaintiff herein, claim was erroneously paid by me as taxpayer to the defendant acting as Collector of Internal Revenue, and was illegally and improperly collected from me as taxpayer by said defendant.

5. On or about December 27, 1934, I as settlor, and George  
10 Arents, Jr., Harold W. Brooks and United States Trust Company of New York, as trustees, executed a certain indenture of trust and on or about the same date I conveyed and delivered to said trustees certain property described in a list attached to said indenture of trust to be held by them upon the trusts in said indenture expressed. A copy of said indenture of trust and a copy of said list of property are jointly attached to the complaint and marked "Exhibit A."

6. On or about March 12, 1935, I duly filed with the defendant as Collector aforesaid a gift tax return for the calendar year 1934 in the form prescribed for use under the Act of Congress approved June 6, 1932, as amended, known as the Gift Tax Act of 1932, and the regulations of the Treasury Department pertaining thereto; and I attached to said return a copy of said indenture of trust and a copy of said list of property which I had conveyed to the trustees as aforesaid. I reported on said return that by reason of the transfer in trust aforesaid, I had made a taxable gift of remainder interests in said trust; that the value of said remainder interests was \$263,201.71; and that a tax in the amount of \$11,181.14 was payable by me in respect of said transfer. A copy of said gift tax return (exclusive of the copy of the trust indenture and list of property thereto attached which are identical with "Exhibit A" aforesaid attached to the complaint) is attached to the complaint and marked "Exhibit B."

7. On or about March 12, 1935, I paid to the defendant as collector aforesaid said sum of \$11,181.14 as a gift tax reported by me  
11 as aforesaid on said gift tax return. All of said sum was paid by me and received by said defendant as federal gift tax for the year 1934 on said transfer of property from me to said trustees under said indenture of trust; and no other federal gift tax was due or owing from me for said year.

8. On or about February 17, 1938, I duly filed with the said defendant a claim for refund of said gift tax paid by me for the year 1934 in the amount of \$11,181.14 with interest thereon according to

law. A copy of said claim for refund is attached to the complaint and marked "Exhibit C."

9. On or about March 11, 1938, said claim for refund of gift tax for the year 1934 was wholly rejected and denied by the Commissioner of Internal Revenue as evidenced by a communication to me from D. S. Bliss, Deputy Commissioner of Internal Revenue, dated March 11, 1938, a copy of which is attached to the complaint and marked "Exhibit D."

10. I have made no assignment of the claim constituting the present cause of action. No part of said sum of \$11,181.14 has been refunded; repaid, or credited to me, and the whole thereof with interest thereon according to law remains due and owing from the defendant to me.

GEORGE A. HUMPHREYS.

Sworn to before me this 24 day of June 1938.

WILLIAM C. QUIRK,

*Notary Public, Bronx County.*

12 In United States District Court, Eastern District of New York

L-7625

*Complaint*

The plaintiff herein, by Carter, Ledyard & Milburn, his attorneys, complains of the defendant above named, and alleges as follows:

First. At all times hereinafter mentioned the plaintiff was and still is a citizen of the United States and a resident of Southampton, Suffolk County, New York.

Second. On information and belief, at all times hereinafter mentioned the defendant was and still is the Collector of Internal Revenue of the United States for the First District of New York, with his office at No. 271 Washington Street, Brooklyn, New York.

Third. This is a suit of a civil nature at common law which arises under the Constitution and laws of the United States of America providing for internal revenue.

Fourth. On or about December 27, 1934, the plaintiff, as settlor, and George Arents, Jr., Harold W. Brooks, and United States Trust Company of New York, as trustees, executed a certain indenture of trust and on or about the same date plaintiff conveyed and delivered to said trustees certain property described in a  
13 list attached to said indenture of trust to be held by them upon the trusts in said indenture expressed. A copy of said indenture of trust and a copy of said list of property are jointly attached hereto, marked Exhibit A, and made a part hereof as though fully set forth herein.

Fifth. On or about March 12, 1935, the plaintiff duly filed with the defendant as collector aforesaid a gift tax return for the calendar

year 1934; in the form prescribed for use under the Act of Congress approved June 6, 1932, as amended, known as the Gift Tax Act of 1932, and the regulations of the Treasury Department pertaining thereto; and the plaintiff attached to said return a copy of said indenture of trust and a copy of said list of the property which he had conveyed to the trustees as aforesaid. The plaintiff reported on said return that, by reason of the transfer in trust aforesaid, he had made a taxable gift of remainder interests in said trust; that the value of said remainder interests was Two hundred sixty-three thousand two hundred one and 71/100 dollars, (\$263,201.71); and that a tax in the amount of Eleven thousand one hundred eighty-one and 14/100 dollars (\$11,181.14) was payable by him in respect of said transfer. A copy of said gift tax return (exclusive of the copy of the trust indenture and list of property thereto attached which are identical with Exhibit A aforesaid) is attached hereto, marked Exhibit B, and made a part hereof as though fully set forth herein.

Sixth. On or about March 12, 1935, the plaintiff paid to the defendant said sum of eleven thousand one hundred eight-one and 14/100 dollars (\$11,181.14), as the gift tax reported by the plaintiff as aforesaid on said gift tax return. All of said sum was paid by the plaintiff and received by the defendant as federal gift tax for the year 1934 on said transfer of property from the plaintiff to said trustees under said indenture of trust; and on other federal gift tax was due or owing from the plaintiff for said year.

Seventh. On information and belief, said sum of eleven thousand one hundred eight-one and 14/100 dollars (\$11,181.14) was erroneously and improperly paid by the plaintiff as taxpayer to the defendant and was illegally and improperly collected by the defendant from the plaintiff, as federal gift tax for the year 1934, for the following reasons:

1. The taxpayer did not make any actual gift by said trust indenture for the reason that he retained in himself not only the beneficial interest in the trust during his life but also the power to alter and amend the trust indenture in such manner as to change the beneficiaries named therein and to prescribe the terms and conditions on which other beneficiaries should take an interest in the trust.

2. Neither the Revenue Act of 1932 nor any other statute of the United States imposes any tax upon transfers or conveyances of property such as those made or purported to have been made by the taxpayer by said trust indenture.

Eighth. On or about February 17, 1938, the plaintiff duly filed with the defendant a claim for refund of said gift tax paid by him for the year 1934 in the amount of eleven thousand one hundred eighty-one and 14/100 dollars (\$11,181.14) with interest thereon according to law. A copy of said claim is attached hereto, marked Exhibit C, and made a part hereof as though fully set forth herein.

15. Ninth. On or about March 11, 1938, said claim for refund of gift tax for the year 1934 (Exhibit C) was wholly rejected and denied by the Commissioner of Internal Revenue, as evidenced by a communication to the plaintiff from D. S. Bliss, Deputy Commissioner of Internal Revenue, dated March 11, 1938, a copy of which is attached hereto, marked Exhibit D, and made a part hereof as though fully set forth herein.

Tenth. The plaintiff has made no assignment of the claim constituting the present cause of action.

Eleventh. No part of said sum of eleven thousand one hundred eighty-one and 14/100 dollars (\$11,181.14) has been refunded, repaid, or credited to the plaintiff, and the whole thereof with interest thereon according to law remains due and owing from the defendant to the plaintiff.

Wherefore plaintiff demands judgment against the defendant in the sum of eleven thousand one hundred eighty-one and 14/100 dollars (\$11,181.14) with interest thereon according to law from March 12, 1935, together with the costs and disbursements of this action.

CARTER, LEDYARD & MILBURN,  
Attorneys for Plaintiff,  
Office and Post Office Address, No. 2 Wall Street,  
Borough of Manhattan, City of New York.

16. [Duly sworn to by George A. Humphreys; jurat omitted in printing.]

17. Exhibit A, annexed to complaint

This indenture made the 27th day of December, 1934, between George Arents Humphreys, residing at Southampton, Suffolk County, New York, (hereinafter called the "Settlor"), and George Arents, Jr., residing at Harrison, Westchester County, New York, Harold W. Brooks, residing at Southampton, Suffolk County, New York, and United States Trust Company of New York, a corporation organized under the Banking Law of the State of New York, having its principal office at 45 Wall Street, Borough of Manhattan, New York City, New York (hereinafter called the "Trustees"):

Whereas, the Settlor desires to create a trust of the property and for the purposes hereinafter mentioned.

Now, therefore, this indenture witnesseth: That in consideration of the premises, the mutual covenants herein contained, and of other good and valuable considerations to him in hand paid at or before the ensembling and delivery of these presents, receipt of which is hereby acknowledged, the Settlor has granted, conveyed, set over, assigned, and delivered, and by these presents does grant, convey, set over, assign, and deliver unto the Trustees, their successors and assigns, the property listed in Schedule A annexed hereto and made a part hereof, hereby agreeing to make, execute and deliver any

further instruments and do and perform any other acts that may be reasonably advisable or necessary in order to vest said property in the Trustees, their successors and assigns.

To have and to hold all and singular the above granted and  
18 described property, together with the appurtenances and all the rights of the Settlor thereto, unto the Trustees, their successors and assigns, in trust nevertheless, for and upon the following uses and purposes, and subject to the terms, conditions, powers and agreements hereinafter set forth.

#### FIRST

To receive, hold, manage, sell, invest, and reinvest the same and every part thereof, in the manner hereinafter specified, and to collect, recover and receive the rents, issues, interest, and income thereof, and after deducting commissions (as hereinafter provided) and the proper and necessary expenses in connection with the administration of the trust, to hold and dispose of the net principal and the net income of the trust as hereinafter directed, namely:

(a) To pay over the net income in quarterly installments to the Settlor until his death.

(b) Upon the death of the Settlor:

(1) To convey, transfer, and pay over one-half of the then corpus of the trust absolutely to George Arents, Jr., of Harrison, New York, or in case he shall die before the Settlor, to his issue per stirpes, or in case neither said George Arents, Jr. nor any issue of his shall survive the Settlor, to the persons who would then correspond to the distributees of the Settlor under the laws of the State of New York if the Settlor had then died intestate leaving him surviving no father and no relative on his father's side and owning said one-half of the corpus of the trust.

19 (2) In case the Settlor's stepfather, Harold W. Brooks, shall survive him, to retain the remaining one-half of the corpus of the trust and to pay over the annual net income therefrom in quarterly installments to the said Harold W. Brooks, until the death of the said Harold W. Brooks, or the death of George Arents, III, of Harrison, New York (whichever event shall first occur), whereupon the trust shall terminate and the Trustees shall thereupon pay over the then remaining corpus to the survivor of the said Harold W. Brooks and the said George Arents, III.

In case, however, the said Harold W. Brooks shall not survive the Settlor, to convey, transfer, and pay over the said remaining one-half of the corpus of the trust absolutely to the said George Arents, III.

If, however, neither the said Harold W. Brooks nor the said George Arents, III, shall survive the Settlor, then to convey, transfer, and pay over the said remaining one-half of the corpus of the trust to the persons who would then correspond to the distributees of the Settlor under the laws of the State of New York if the Settlor had

then died intestate leaving him surviving no father and no relative on his father's side and owning said remaining one-half of the corpus of the trust.

## SECOND

(a) Any share of principal which shall, in pursuance of the provisions hereof, become payable to a person who, at the time when payment is herein directed to be made, has not attained the age of twenty-one years, shall vest absolutely in such person and be his or her property, but the Trustees may hold such share and  
20 collect the income therefrom, and may in their discretion pay over or apply to the use of such minor, so much of the share of the principal to which such minor is entitled, and of the income thereof, as the Trustees may deem necessary or proper for the support and education of such minor, and when such minor becomes twenty-one years of age, the Trustees shall pay over to him or her the principal of his or her share, or the part thereof then remaining in the hands of the Trustees, together with the unexpended income from such share. If any such minor die before reaching twenty-one years of age, the principal and accumulations shall be paid over to his or her executor or administrator as part of his or her estate. If the provisions of this paragraph "a" shall be attacked, and if it shall be determined that the authority of the Trustees to hold the share of a minor is void for any reason, then the share in question shall be immediately paid over to the guardian of the minor in whom it is vested. The provisions of this paragraph "a" are incidental to the Settlor's plan, and in no event shall it be determined that, by reason of the invalidity of this paragraph, any other provision of this agreement is invalid.

(b) The Trustees may make payment of any income or principal payable to a minor by making such payment, in their discretion, either to the parent or guardian of such minor, or to such minor, and the receipt of such parent or guardian, or of such minor, or evidence of the expenditure of such money for the benefit of such minor, shall be a full and sufficient discharge to said Trustees for any such payment.

(c) No assignment or order by any beneficiary by way of anticipation of any part of the income of the trust herein created shall  
21 be valid, but the income shall be paid by the Trustees direct to the person entitled to receive it, or deposited to the beneficiary's account in some bank of good standing and repute without regard to any assignment or order; nor can the principal or income of said trust become attached by trustee process or garnishment or other legal proceeding while in the hands of the Trustees, except to the extent permitted by law.

## THIRD

(a) The Trustees are hereby expressly authorized and empowered, in their discretion, to retain the property hereinabove described in the form in which the Trustees receive it from the Settlor.

(b) The Trustees are hereby expressly authorized and empowered, in their discretion, to sell said property, or any part thereof, as well as any property hereafter acquired in trust hereunder and to reinvest the same and the proceeds of the sale thereof in any securities authorized by the Laws of the State of New York for the investment of trust funds and in the bonds or capital stock, of any class, of any corporation in the United States whose bonds or stocks are commonly bought and sold in the city of New York.

(c) Any dividend payable in the stock of the corporation or association declaring or authorizing the same in respect of any stock held by the Trustees shall be treated as principal of the trust estate and retained by the Trustees as such so far as permitted by law. All cash dividends of every kind and nature whatsoever, excepting liquidating dividends, received by the Trustees on any shares of stock held in trust hereunder shall be treated as income.

22. (d) The Trustees are hereby expressly relieved from any obligation to establish any sinking fund in order to restore to the principal of the trust estate any premium on any investments made by the Trustees, and they are expressly forbidden to make any deduction whatever from the income of the trust estate for such purpose.

(e) The Trustees are hereby empowered, in their discretion, to vote in person or by proxy in respect of any shares of stock which at any time may form part of the trust fund hereunder.

(f) The Trustees are hereby authorized, in their discretion, to unite with other owners of similar property in carrying out any plan for the reorganization of any corporation or company whose securities are held by said Trustees; to exchange securities of any such corporation or company for others issued by the same or by any other corporation or company upon such terms as the Trustees shall deem proper; to assent to the consolidation or merger of any corporation or company whose securities are held by the Trustees with any other corporation or company, to the sale or lease by such corporation or company of its property or any portion thereof to any other corporation or company, or to the sale or lease by any other corporation or company of its property or any portion thereof to such corporation or company, and upon such consolidation, merger, sale, lease or similar arrangement, to exchange the securities held by the Trustees for other securities issued in connection with such arrangement; to pay all such assessments, expenses and sums of money as the Trustees may deem expedient for the protection of their interest as holder of the stocks, bonds or other securities of any corporation or company; and generally to exercise in respect of all securities held  
23 by the Trustees all the same rights and powers as are or may be lawfully exercised by persons owning similar property in their own right.

(g) The Trustees shall have full power to sell, lease, mortgage, or exchange any real estate forming part of the trust fund, at such times and upon such terms and conditions as they may deem proper,

and to make, execute, and deliver good and sufficient deeds, leases, mortgages, or other instruments affecting the same. The Trustees may lease real estate for any period of time without regard to the duration of the trust, and without authorization by any court.

(h) No purchaser upon any sale by the Trustees shall be bound to see to the application of the purchase money arising therefrom, or to inquire into the validity, expedience, or propriety of any such sale.

#### FOURTH

Trust investments need not be registered in the names of the Trustees as such, but may be held either in the names of the Trustees as such or in the Trustees' own names without describing the trust or in the name of a nominee of the Corporate Trustee or in bearer form. The holding of investments in any of the forms above described shall neither increase nor decrease the liability of the Trustees.

#### FIFTH

24 In any case in which the Trustees are required, pursuant to the provisions of this Indenture, to divide the principal of the trust estate into parts or shares, or to distribute the same, or any part thereof, they are authorized and empowered, in their sole discretion, to make such division or distribution in kind or in money, or partly in kind and partly in money, and, for the purpose of such allotment, the judgment of the Trustees concerning the propriety thereof and the relative value for the purpose of division or distribution of the property and securities so allotted shall be binding and conclusive on all persons and corporations interested therein.

#### SIXTH

The trust hereby created shall be deemed a New York trust and shall in all respects be governed by the Laws of the State of New York.

#### SEVENTH

This trust is hereby declared to be irrevocable and it shall not at any time, by any person or persons, be capable of modification in any manner, except that the Settlor reserves the right, without the consent of the Trustees or of any beneficiary hereunder, at any time and from time to time during his life, by an instrument or instruments in writing under his hand and duly acknowledged so as to authorize it or them to be recorded in the State of New York, to alter and amend this Trust Deed to the extent of substituting for the beneficiaries named herein other beneficiaries and to prescribe the terms and conditions on which such other beneficiaries shall take an interest in the trust, but the Settlor shall not by any such alteration

or amendment increase his personal beneficial interest in the trust estate.

25

## EIGHTH

The Trustees shall render annually to the Settlor and to the other beneficiaries of the trust an account of their transactions under this Indenture.

## NINTH

(a) The Corporate Trustee shall be entitled to receive as compensation for its services as such—

(1) A commission of one and one-half per cent. ( $1\frac{1}{2}\%$ ) of the value (computed in the case of securities at market prices) of the principal of the trust received and distributed by the Trustees. Such commission shall be payable out of the principal when and as such principal is paid out by the Trustees.

(2) A commission of two and one-half per cent. ( $2\frac{1}{2}\%$ ) on the first \$20,000 of income received and disbursed by the Trustees in each calendar year and of one and one-half per cent. ( $1\frac{1}{2}\%$ ) on any amount of income in excess of \$20,000 received and disbursed by the Trustees in each such calendar year. The Trustees are hereby authorized to deduct the Corporate Trustee's commission on income and pay it to the Corporate Trustee from time to time before paying the net income to the income beneficiary or beneficiaries hereunder.

The Individual Trustees shall receive no compensation for their services as such.

26 (b) The Trustees are authorized, in the discharge of their duties, to employ counsel and agents and to determine and pay to them reasonable compensation, and they shall also be entitled to reimbursement for the same and for such other expenses and charges as they may deem necessary and proper to incur for the proper discharge of their duties and for the proper management and administration of the trust hereby created.

(c) All such charges and expenses shall be charged against principal or income, as the Trustees may deem proper.

## TENTH

Any corporation into which the Corporate Trustee may be merged, or with which it may be consolidated, or any corporation resulting from any merger or consolidation to which the Corporate Trustee shall be a party, or any corporation which shall otherwise become the lawful successor to the assets and business of the Corporate Trustee as an entirety, or substantially as an entirety, shall be the successor of the Corporate Trustee hereunder, without the execution or filing of any instrument, or any further act, provided such corporation shall be a corporation organized under the Laws of the State of New York or the United States of America.

## ELEVENTH

The word "Trustees" as herein used is intended to mean not only the Trustees hereby appointed but also the trustees from time to time acting hereunder, and its or their successor or successors and substitute or substitutes from time to time acting hereunder.

## TWELFTH

The Trustees hereby accept the trusts hereby created and covenant that they will faithfully discharge all the duties of their office as such Trustees.

27 In witness whereof, the Settlor and the Individual Trustees have hereunto set their hands and seals, and the Corporate Trustee has caused these Presents to be executed in its name, and its corporate seal to be hereunto affixed, by its officers duly authorized, the day and year first above written.

GEORGE ARENTS HUMPHREYS, [L. S.]  
Settlor.

GEORGE ARENTS, JR., [L. S.]

HAROLD W. BROOKS, [L. S.]

UNITED STATES TRUST COMPANY  
OF NEW YORK,

By T. H. WILSON, Vice President,  
Trustees.

Attest:

H. M. MANSELL, Assistant Secretary.

STATE OF NEW YORK,

County of New York, ss:

On the 27th day of December 1934, before me personally came George Arents Humphreys, to me known and known to me to be one of the individuals described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

N. A. MULLINS,

Notary Public, Kings County, N. Y., No. 657.

Cert. Filed in New York Co. No. 657.

New York Co. Reg. No. 5-M-381, Kings Co. Reg. No. 5284.

Commission expires March 30, 1935.

28 STATE OF NEW YORK,

County of New York, ss:

On the 27th day of December 1934, before me personally came George Arents, Jr., to me known and known to me to be one of the individuals described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

N. A. MULLINS,

Notary Public, Kings County, N. Y., No. 657.

Cert. Filed in New York Co. No. 657.

New York Co. Reg. No. 5-M-381, Kings Co. Reg. No. 5284.

Commission expires March 30, 1935.

## STATE OF NEW YORK,

*County of New York, ss:*

On the 27th day of December 1934, before me personally came Harold W. Brooks to me known and known to me to be one of the individuals described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

N. A. MULLINS,

*Notary Public, Kings County, N. Y., No. 657,**Cert. Filed in New York Co. No. 657,**New York Co. Reg. No. 5-M-381, Kings Co. Reg. No. 5284.*

Commission expires March 30, 1935.

## 29 STATE OF NEW YORK,

*County of New York, ss:*

On the 27th day of December 1934, before me came Thomas H. Wilson, to me known, who, being by me duly sworn, did depose and say, that he resides in Scarsdale, New York, that he is the Vice President of United States Trust Company of New York, the corporation described in, and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument in such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation; and that he signed his name thereto by like order.

N. A. MULLINS,

*Notary Public, Kings County, N. Y., No. 657,**Cert. Filed in New York Co., No. 657,**New York Co. Reg. No. 5-M-381, Kings Co. Reg. No. 5284.*

Commission expires March 30, 1935.

## SCHEDULE A

## Shares

200 Standard Oil Company of California capital stock, no par.

200 New Jersey Zinc Company capital stock, par \$25.

300 General Motors Corporation common stock, par \$10.

100 Continental Can Company common stock, par \$20.

100 Allied Chemical & Dye Corporation common stock,  
no par.30 200 United States Tobacco Company common stock, par  
\$100.300 Liggett & Myers Tobacco Company common stock "B," par  
\$25.100 Consolidated Gas Company of New York preferred stock,  
no par.

## Bonds

\$6,000. City of Mount Vernon, N. Y. 4 1/4% Sewerage Bonds, dated  
June 1, 1927, due June 1, 1942, interest June and December 1st.

## Bonds

- \$9,000. City of Mount Vernon, N. Y.,  $4\frac{1}{4}\%$  Third Street Widening Bonds, dated June 1, 1927, due June 1, 1942, interest June & December 1st.
- 2,000. City of Jersey City, N. J.,  $4\frac{1}{4}\%$  School Gold Bonds, dated September 3, 1912, due September 3rd, 1962, interest March & September 1st.
- 25,000. City of Cleveland, Ohio,  $4\frac{1}{2}\%$  Public Hall Bonds, dated May 1, 1916, due May 1, 1966, interest May and November 1st.
- 25,000. City of New Rochelle, N. Y., 4% Grade Crossing Bonds, due December 1st, 1939, interest May & November 1st, dated December 1, 1909; registered.
- 16,000. Corporate Stock of the City of New York, 4%, due November 1, 1956, interest May & November 1st; registered.
- 1,000. City of Newark, N. J.,  $4\frac{1}{2}\%$  Market Bond, dated December 15, 1913, due December 15, 1943, interest June and December 15, registered.
- 3,000. City of New Rochelle, N. Y., 4% Sewer Bonds, dated November 1, 1924, due May 1, 1946, interest May & November 1st.
- 31 2,000. City of New Rochelle, N. Y. 4% Sewer Bonds, dated November 1, 1924, due May 1, 1950, interest May & November 1st.
- 2,000. City of New Rochelle, N. Y. 4% Sewer Bonds, dated November 1, 1924, due May 1, 1951, interest May & November 1st.
- 3,000. City of New Rochelle, N. Y. 4% Sewer Bonds, dated November 1, 1924, due May 1, 1952, interest May & November 1st.
- 4,000. City of New Rochelle, N. Y., 4% School Bonds, dated November 1, 1924, due May 1, 1952, interest May & November 1st.
- 16,000. Corporate Stock of the City of New York,  $4\frac{1}{4}\%$ , due March 1, 1964, interest March & September 1st.
- 10,000. Corporate Stock of the City of New York, 4%, due May 1, 1959, interest May & November 1st.
- 5,000. Corporate Stock of the City of New York,  $4\frac{1}{4}\%$ , Redeemable after March 1, 1930, due March 1, 1960, interest March & September 1st.
- 10,000. City of Omaha, Nebraska, 5% Gas Plant Purchase Bonds, dated July 1, 1920, due July 1, 1950, interest January and July 1st, with the July 1, 1935 and subsequent coupons attached.
- 3,000. City of Mount Vernon, N. Y.  $4\frac{1}{4}\%$  Drainage Bonds, dated July 1, 1927, due June 1, 1942, interest June and December 1st.
- 5,000. Town of Harrison, N. Y.  $4\frac{1}{4}\%$  Water Distribution System Bonds, dated June 1, 1927, due June 1, 1965, interest June and December 1st.

## Bonds

- 32 \$5,000. Town of Harrison, N. Y.  $4\frac{1}{4}\%$  Water Distribution System Bonds, dated June 1, 1927, due June 1, 1963, interest June and December 1st.
- 5,000. Town of Harrison, N. Y.  $4\frac{1}{4}\%$  Water Distribution System Bonds, dated June 1, 1927, due June 1, 1961, interest June and December 1st.
- 5,000. Town of Harrison, N. Y.  $4\frac{1}{4}\%$  Water Distribution System Bonds, dated June 1, 1927, due June 1, 1959, interest June and December 1st.
- 5,000. Town of Harrison, N. Y.  $4\frac{1}{4}\%$  Water Distribution System Bonds, dated June 1, 1927, due June 1, 1957, interest June and December 1st.
- 5,000. Town of Harrison, N. Y.  $4\frac{1}{4}\%$  Water Distribution System Bonds, dated June 1, 1927, due June 1, 1955, interest June and December 1st.
- 7,000. County of Bergen, N. J.  $4\frac{1}{4}\%$  Road, Bridge & Hospital Bonds, dated December 1, 1927, due December 1, 1936, interest June & December 1st.
- 15,000. State of West Virginia 4% Gold Bonds, dated January 1, 1925, due January 1, 1948, interest January and July 1, with the July 1, 1935 and subsequent coupons attached.
- 10,000. State of West Virginia 4% Gold Bonds, dated April 1, 1923, due April 1, 1944, interest April and October 1st.
- 10,000. State of West Virginia 4% Gold Bonds, dated April 1, 1923, due April 1, 1943, interest April and October 1st.
- 20,000. State of Oregon, Oregon Veterans State Aid  $4\frac{1}{4}\%$  Gold Bonds, Series #2, due October 1, 1941, interest April & October 1st.
- 33 25,000. State of North Carolina Building Bond for Educational and Charitable Institutions,  $4\frac{1}{2}\%$ , dated October 1, 1923, due October 1, 1963, interest April and October 1st. (Temporary.)
- 25,000. Territory of Hawaii 4% Refunding Bonds, Series A, dated May 15, 1916, due May 15, 1946, interest May & November 15th.
- 10,000. Federal Farm Loan Bonds, the Federal Land Bank of Houston,  $4\frac{1}{2}\%$ , redeemable after January 1, 1933, payable January 1, 1943, interest January and July 1st, with the July 1, 1935, and subsequent coupons attached.
- 25,000. Federal Farm Loan Bonds, the Federal Land Bank of Berkeley,  $4\frac{1}{2}\%$ , redeemable after January 1, 1933, due January 1, 1943, interest January 1st and July 1st, with the July 1, 1935, and subsequent coupons attached.
- 31,000. County of Westchester, N. Y.,  $4\frac{1}{4}\%$  County Park Bonds, dated June 1, 1926, due June 1, 1944, interest June and December 1st.
- 2,000. County of Westchester, N. Y., 4% County Park Bonds, dated June 1, 1927, due June 1, 1945, interest June and December 1st.

## Bonds

- \$50,000. County of Westchester, N. Y., 4%, County Park Bonds, dated June 1, 1927, due June 1, 1945, interest June and December 1st.
- 1,000. City of Toledo, Ohio, 4½% Boulevard Bond, dated March 1, 1927, due March 1, 1946, interest March & September 1st.
- 34 3,000. City of Toledo, Ohio, 4½% Sewerage Disposal Works Bonds, dated March 1, 1927, due March 1, 1946, interest March and September 1st.
- 85,000. City of Toledo, Ohio, 4½% Intercepting Sewer Bonds, dated March 1, 1927, due March 1, 1946, interest March and September 1st.
- 22,000. City of St. Paul, Minn., 4¼% School Bonds, dated January 1, 1924, due January 1, 1954, interest January and July 1st, with the July 1, 1935 and subsequent coupons attached.
- 12,000. City of St. Paul, Minn., 4½% General Improvement Bonds, dated July 1, 1932, due July 1, 1955, interest January and July 1, with the July 1, 1935, and subsequent coupons attached.
- 5,000. City of St. Paul, Minn., 4½% General Improvement Bonds, dated July 1, 1932, due July 1, 1958, interest January and July 1, with the July 1, 1935, and subsequent coupons attached.
- 20,000. City of Baltimore, Md., 4% Paving Loan, dated April 13, 1911, due August 1, 1951, interest February and August 1st; registered.
- 6,000. City of Albany, N. Y., 4½% School Bonds, Series A, dated May 1, 1932, due May 1, 1964, interest May & November 1st.
- 8,000. City of Albany, N. Y., 4¼% Water Bonds, Series B, dated May 1, 1932, due May 1, 1964, interest May & November 1st.
- 10,000. City of Baltimore, Md., 4% Third Sewer Serial Loan, dated October 1, 1931, due October 1, 1956, interest April and October 1st.
- 35 40,000. City of Buffalo, N. Y., 4 2/10% Refunding Bonds, dated September 1, 1933, due September 1, 1943, interest March and September 1st.
- 16,000. City of Detroit, Mich., 4¼% Markets Refunding Bonds, Series A, dated June 1, 1933, due June 1, 1949, interest June and December 1st; with two coupons due June 1, 1935, attached.
- 1,000. City of Detroit, Mich., 4¼% Public Sewer Refunding Bond, Series A, dated May 15, 1933, due November 15, 1958, interest May and November 15th, with two coupons due May 1, 1935, attached.
- 9,000. City of Detroit, Mich., 4% Public Utility (Water Supply) Bonds, dated December 15, 1925, due December 15, 1955, interest June and December 15th.

## Bonds

- \$11,000. City of Newark, N. J. 4% City Railway Construction Bonds, due June 1, 1958, interest June and December 1st. (dated 6/1/31).
- 2,000. City of Newark, N. J. 4% City Railway Construction Bonds, dated June 1, 1931, due June 1, 1969, interest June and December 1st.
- 10,000. City of Minneapolis, Minn., 4% School Bonds, dated May 1, 1911, due May 1, 1941, interest May and November 1st; registered.
- 1,000. City of Minneapolis, Minn., 4% High School Bond, dated November 1, 1913, due November 1, 1939, interest May and November 1st.
- 10,000. City of Minneapolis, Minn., 4% Tax Refund Bonds, dated July 1, 1915, due July 1, 1945, interest January and July 1st, with the July 1, 1935, and subsequent coupons attached.
- 36 24,000. City of Louisville, Ky., 4¼% Refunding Gold Bonds, dated December 1, 1928, due December 1, 1968, interest June and December 1st.
- 4,000. City of Detroit, Mich., 4½% Public Lighting Refunding Bonds, Series A, dated January 1, 1933, due January 1, 1963, interest January and July 1st, with the July 1, 1935 and subsequent coupons attached; & 2 coupons due 1/1/35 attached.
- 4,000. City of Detroit, Mich., 4½% Dock Refunding Bonds, Series A, dated January 15, 1933, due January 15, 1963, interest January and July 15th, with two coupons due January 15, 1935, attached.
- 5,000. City of Detroit, Mich. 4½% Public Sewer Refunding Bonds, Series A, dated February 1, 1933, due February 1, 1963, interest February and August 1st, with two coupons due February 1, 1935, attached.
- 24,000. City of Detroit, Mich. 4¼% Public Utility (Water Supply) Bonds, dated December 15, 1929, due December 15, 1959, interest June and December 15th.
- 16,000. City of Detroit, Mich. 4% Public Sewer Refunding Bonds, Series A, dated May 15, 1933, due May 15, 1956, interest May & November 15th, with two coupons due May 15, 1935 attached.
- 48,000. State of Delaware, State Highway Loan 4% Bonds, dated January 1, 1925, due January 1, 1965, interest January and July 1st, with the July 1, 1935 and subsequent coupons attached.
- 37 10,000. State of Illinois, State Highway 4% Bonds, dated March 1, 1923, due March 1, 1940, interest payable March 1st, annually.
- 15,000. State of Illinois, State Highway 4% Bonds, dated March 1, 1923, due March 1, 1939, interest payable March 1st, annually.

## Bonds

- \$7,000. State of Michigan, 4% Refunding Highway Improvement Bonds, dated May 1, 1925, due May 1, 1940, interest May and November 1st.
- 25,000. State of Michigan 4¼% Highway Improvement Bonds, dated May 15, 1924, due May 15, 1944, interest May and November 15th.
- 6,000. State of Illinois, State Highway 4% Bonds, dated June 1, 1924, due March 1, 1944, interest March 1st, annually.
- 4,000. State of Illinois, State Highway 4% Bonds, dated March 1, 1923, due March 1, 1943, interest March 1st, annually.
- 15,000. State of Minnesota, 4¼% Rural Credit Bonds, dated February 15, 1924, due February 15, 1944, interest February and August 15th.
- 15,000. State of Minnesota, 4% Rural Credit Bonds, dated December 15, 1923, due December 15, 1943, interest June and December 15th.
- 20,000. State of Minnesota, 4¼% Rural Credit Bonds, dated June 1, 1924, due June 1, 1954, interest June and December 1st.
- 38 1,000. State of Missouri, 4¼% Road Bond, Series U, dated August 1, 1932, due June 1, 1952, interest June and December 1st.
- 10,000. State of Missouri, 4¼% Road Bonds, Series I, dated September 1, 1926, due March 1, 1935, interest March and September 1st.

*Exhibit B, annexed to complaint*

Taxpayer's copy. Detach and retain this copy and the Instructions. Orig. filed 3-12-35.

## GIFT TAX RETURN, CALENDAR YEAR 1934

(To be Filed in Duplicate Under the Provisions of the Gift Tax Act of 1932, as Amended.)

Name of donor, George A. Humphreys.

Address, Southampton, Suffolk County, N. Y.

Citizenship, United States.

Residence, Southampton, Suffolk County, N. Y.

Have you (the donor), during the calendar year indicated above, without an adequate and full consideration in money or money's worth, made any transfer exceeding \$5,000 in value (or regardless of value if a future interest) as follows? (Answer "Yes" or "No.")

1. By the creation of an irrevocable trust for the benefit of another. Yes;

2. By making additions to an irrevocable trust previously created for the benefit of another. No;

3. By permitting a beneficiary (other than yourself) to receive the income from a revocable trust, where you possessed the power of

revocation and chose during the year not to exercise it, whether such trust was created before or after the enactment, on June 6, 1932, of the Gift Tax Act of 1932. No;

4. By relinquishing a power to revoke a trust created for the benefit of another. No;

5. By permitting another to withdraw funds from a joint bank account which were deposited by you. No;

6. By irrevocably assigning a life insurance policy, or by naming a beneficiary of a policy without retaining any of the legal incidents of ownership therein. No;

7. By paying a premium under an insurance policy in which you retain none of the legal incidents of ownership and the proceeds of which are payable to a beneficiary other than yourself or your estate. No;

8. By conveying title to another and yourself as joint tenants or to your wife or husband and yourself as tenants by the entirety. No;

9. By any other method, direct or indirect, whereby another received a gift. No.

40 If the answer is "Yes" to any of the foregoing, such transfer should be fully disclosed under schedule A or B.

#### COMPUTATION OF AMOUNT OF NET GIFTS FOR YEAR

1. Amount of gifts for year other than charitable, etc., gifts (item c, schedule A)-----	\$263, 201. 71
2. Amount of charitable, public, and similar gifts for year (item c, schedule B)-----	None
3. Total amount of gifts for year (item 1 plus item 2)-----	263, 201. 71
4. Amount of charitable, public, and similar gifts for year (item c, schedule B)-----	None
5. Specific exemption claimed (not exceeding \$50,000, less total amount of specific exemption claimed for preceding years)---	50, 000. 00
6. Total deductions (item 4 plus item 5)-----	50, 000. 00
7. Amount of net gifts for year (item 3 minus item 6)-----	213, 201. 71

#### COMPUTATION OF TAX

1. Amount of net gifts for year (item 7, above)-----	\$213, 201. 71
2. Total amount of net gifts for preceding years (item b, schedule C)-----	None
3. Total net gifts (item 1 plus item 2)-----	213, 201. 71
4. Tax computed on item 3-----	11, 181. 14
5. Tax computed on item 2-----	None
6. Tax on net gifts for year (item 4 minus item 5)-----	11, 181. 14

#### AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, if any, has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete

return for the calendar year stated, pursuant to the Gift Tax Act of 1932, as amended, and the regulations issued thereunder, and no transfer required by said law and regulations to be returned other than the transfer or transfers disclosed herein under schedules A or B was made by me (the donor) during said calendar year. George Humphreys. (Signature of donor/executor.)

Sworn to and subscribed before me this 5 day of March, 1935. William C. Quirk. (Signature and title of officer administering oath.) Notary Public, Bronx County. Bronx Co. Clk's No. 3 (etc.). N. Y. Co. Clk's No. 16 (etc.). [Seal.]

42

## AFFIDAVIT

I swear (or affirm) that I prepared this return for the person named herein and that this return, including the accompanying schedules and statements, if any, is a true, correct, and complete statement of all the information respecting the donor's gift tax liability of which I have any knowledge. James L. Dohr. (Signature of person preparing return.)

Sworn to and subscribed before me this 12th day of March, 1935. Hildur R. Dunham. (Signature and title of officer administering oath.) [Seal.]

43 SCHEDULE A.—GIFTS DURING YEAR OTHER THAN CHARITABLE, PUBLIC, AND SIMILAR GIFTS

Item No.	Description of gift, motive, donee's name and address, and relationship to donor	Date of gift	Value at
			Date of gift
1	Transfer in Trust as per copy of Trust Deed attached and list of property attached thereto.	12-27-34	
	Value of Property, \$1,025,887.56. Present value of Remainders. Trustor's age 21 yrs. 4 mos. 0.25656.		\$263,201.71
	Gift—Trustees—United States Trust Company of New York, 45 Wall Street, N. Y. City. George Arents, Jr., and Harold W. Brooks.		
(a)	Total		263,201.71
(b)	Less total exclusions not exceeding \$5,000 for each donee (except future interest)		
(c)	Included amount of gifts for year other than charitable, etc., gifts		263,201.71

44 SCHEDULE C.—RETURNS, AMOUNTS OF SPECIFIC EXEMPTION, AND NET GIFTS FOR PRECEDING YEARS (SUBSEQUENT TO JUNE 6, 1932)

Calendar Year	Collection district in which prior return was filed	Amount of specific exemption gifts	
		Amount of net exemption gifts	Amount of net exemption gifts
1933			None
(a) Total amount of specific exemption claimed for preceding years		None	
(b) Total amount of net gifts for preceding years			None

*Exhibit C, annexed to complaint*

## CLAIM

To be filed with the Collector where assessment was made or tax paid.

Collector's stamp. (Date received.) Received Feb. 17, 1938.  
Collector Int. Rev., 1st Dist. of N. Y.

45 The collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

X Refund of Tax Illegally Collected.

Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

Abatement of Tax Assessed (not applicable to estate or income taxes).

STATE OF NEW YORK,

*County of New York, ss:*

Type or print—Name of taxpayer or purchaser of stamps: George Arents Humphreys. Business address: 511 Fifth Avenue, New York City. Residence: (Street), (City), Southampton, County, Suffolk, (State), New York.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—First New York District.
2. Period (if for income tax, make separate form for each taxable year) from—Jan 1, 1934, to Dec. 31, 1934.
- 46 3. Character of assessment or tax—Gift Tax.
4. Amount of assessment,—\$11,181.14; dates of payment—March 12, 1935.
5. Date stamps were purchased from the Government—
6. Amount to be refunded—(exclusive of interest) \$11,181.14.
7. Amount to be abated (not applicable to income or estate taxes)—\$.
8. The time within which this claim may be legally filed expires, under Section—528 (b) (1) of the Revenue Act of 1932, on March 12, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

(See attached statement)

(Signed) GEORGE A. HUMPHREYS.

Sworn to and subscribed before me this 14 day of February 1938.

[SEAL] William C. Quirk. (Signature of officer administering oath.) Notary Public, Bronx County. Bronx Co. Clk's No. 5, Reg. No. 2Q38. N. Y. Co. Clk's No. 18, Reg. No. 8Q14. Term Expires March 30, 1938.

## 47 STATEMENT ATTACHED TO CLAIM FOR REFUND, FILED BY GEORGE ARENTS HUMPHREYS, CLAIMING REFUND OF FEDERAL GIFT TAX FOR THE YEAR 1934

Claim hereby is made that on March 12, 1935, there was erroneously paid by and improperly collected from the taxpayer, George Arents Humphreys, the sum of \$11,181.14 as gift tax for the year 1934.

The facts relative to said erroneous payment and collection of tax are as follows:

By indenture of trust dated December 27, 1934, the taxpayer conveyed certain personal property consisting of bonds and shares of stock to trustees to be held by them upon the trusts in said indenture expressed. A copy of said indenture and a schedule of the property conveyed were attached to the taxpayer's gift tax return for 1934 and the same are incorporated herein by reference.

By the First article of said indenture the trustees were directed "To pay over the net income in quarterly installments to the Settlor until his death"; and upon his death to convey one-half of the then corpus of the trust absolutely to certain persons in said indenture mentioned; and to retain the remaining one-half of the corpus in further trust for the benefit of the Settlor's stepfather during a prescribed period and then to convey it absolutely to persons in said indenture described; or in case the taxpayer's stepfather should not survive the Settlor, to distribute the remaining one-half of the corpus absolutely upon the Settlor's death to persons in said indenture described.

48 The Seventh article of said trust indenture provides:

"This trust is hereby declared to be irrevocable and it shall not at any time, by any person or persons, be capable of modification in any manner, except that the Settlor reserves the right, without the consent of the Trustees or of any beneficiary hereunder, at any time and from time to time during his life, by an instrument or instruments in writing under his hand and duly acknowledged so as to authorize it or them to be recorded in the State of New York, to alter and amend this Trust Deed to the extent of substituting for the beneficiaries named herein other beneficiaries and to prescribe the terms and conditions on which such other beneficiaries shall take an interest in the trust, but the Settlor shall not by any such alteration or amendment increase his personal beneficial interest in the trust estate."

On or about March 12, 1935, the taxpayer filed a gift tax return for the year 1934 with the Collector of Internal Revenue for the First New York District, in which he erroneously reported that, by means of the above described trust indenture, he had on December 27, 1934, made gifts of remainder interests in the trust which had a value of \$263,201.71. Also, on or about March 12, 1935, the taxpayer paid to the Collector of Internal Revenue for the First New York

District the sum of \$11,181.14 in payment of the gift tax liability shown on said return.

Claim is hereby made for refund of said sum of \$11,181.14, together with interest thereon from the date of payment, on the following grounds:

49 1. The taxpayer did not make any actual gift by said trust indenture for the reason that he retained in himself not only the beneficial interest in the trust during his life but also the power to alter and amend the trust indenture in such manner as to change the beneficiaries named therein and to prescribe the terms and conditions on which other beneficiaries should take an interest in the trust.

2. Neither the Revenue Act of 1932 nor any other statute of the United States imposes any tax upon transfers or conveyances of property such as those made or purported to have been made by the taxpayer by said trust indenture.

3. The courts of the United States have decided that the creation of a trust, by instrument containing provisions such as those contained in the trust indenture executed by the taxpayer on December 27, 1934, does not constitute, create or effect a "gift" which is taxable under the statutes of the United States. *Hesslein v. Hoey* (S. D. N. Y. 1937) 18 F. Supp. 169, aff'd 91 F. (2d) 954 (C. C. A. 2d, 1937), cert. den. Dec. 6, 1937. See also other authorities referred to in the courts' opinions in said cases.

Wherefore, the taxpayer claims that said sum of \$11,181.14 was improperly collected from him; and that refund of said amount, together with interest thereon from the date of said collection, should be made to him.

50 • *Exhibit D, annexed to complaint*

TREASURY DEPARTMENT,  
Washington, Mar. 11, 1938.

Office of Commissioner of Internal Revenue. Address reply to Commissioner of Internal Revenue and refer to MT-ET-GT-247-34-1st New York. Donor—George A. Humphreys.

MR. GEORGE A. HUMPHREYS,

511 Fifth Avenue, New York, New York.

SIR: Reference is made to your claim, Form 843, filed February 17, 1938, for refund of Federal gift tax in the amount of \$11,181.14 paid for the calendar year 1934.

Your claim is based upon the contention that you did not make any actual gift by the trust agreement dated December 27, 1934, for the reason that you retained not only the beneficial interest in the trust during your life but also the power to alter and amend the trust indenture in such manner as to change the beneficiaries therein and to prescribe the terms and conditions on which other beneficiaries should take in the trust.

Article seventh of the trust agreement provides that the trust is irrevocable and that it shall not at any time be capable of  
 51 modification in any manner, except that the settlor reserves the right to alter and amend the trust deed to the extent of substituting for the beneficiaries named therein other beneficiaries but the settlor shall not by any such alteration or amendment increase his personal beneficial interest in the trust estate.

Accordingly, you entirely divested yourself of the right to reinvest yourself with the corpus of the trust and the present worth of the remainder after the termination of your life estate was beyond recall by you.

In this connection, your attention is called to article 3 of Regulations 79 (1936 Edition) relating to gift tax under the Revenue Act of 1932, as amended, and supplemented by the Revenue Acts of 1934 and 1935, which provides in part as follows:

"As to any property, or part or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself, the gift is complete. \* \* \*

It is noted that you refer to the decision in the case of Hesslein v. Hoey. In this connection, you are advised that this office does not consider the decision in the case referred to as a final adjudication of this question and it is understood that eventually a case involving this issue will be taken to the Supreme Court.

Accordingly, your claim for refund is rejected in its entirety.

Respectfully,

GUY T. HELYERING,  
*Commissioner.*

By D. S. BLISS,  
*Deputy Commissioner.*

52 In United States District Court, Eastern District of New York

L-7625

*Answer*

The defendant, by his attorney, Michael F. Walsh, United States Attorney for the Eastern District of New York, answering the complaint of the plaintiff herein, states and alleges:

First. Denies each and every allegation contained in paragraph "Fifth" of the complaint, except that he admits that on or about March 12, 1935, the plaintiff filed with the defendant as Collector a gift tax return for the calendar year 1934.

Second. Denies each and every allegation contained in paragraph "Sixth" of the complaint except that he admits that on or about March 12, 1935, plaintiff paid to the defendant the sum of Eleven

Thousand, One Hundred Eighty-one and 14/100 Dollars (\$11,181.14).

Third. Denies each and every allegation contained in paragraph "Seventh" of the complaint.

Fourth. Denies each and every allegation contained in paragraph "Eighth" of the complaint, except that he admits that on or about February 17, 1938, the plaintiff filed with the defendant a claim for refund of said gift tax paid by him for the year 1934 in the amount of Eleven Thousand One Hundred Eighty-one and 14/100 Dollars (\$11,181.14), with interest thereon according to law.

53-54 Fifth. Denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "Tenth" of the complaint.

Sixth. Denies each and every allegation contained in paragraph "Eleventh" of the complaint, except that he admits that no part of said sum of Eleven Thousand, One Hundred Eighty-one and 14/100 Dollars (\$11,181.14) has been refunded, repaid or credited to the plaintiff.

Wherefore, defendant demands judgment dismissing the complaint herein, with costs.

MICHAEL F. WALSH,

*United States Attorney, Eastern District of New York,*

*Attorney for Defendant,*

*519 Federal Building, Borough of Brooklyn, City of New York.*

*[Duly sworn to by Almon G. Rasquin; jurat omitted in printing.]*

55 In United States District Court, Eastern District of New York

L-7625

*Stipulation as to record*

It is hereby stipulated and agreed that the foregoing portions of the record and proceedings are hereby designated as the parts thereof to be included in the record on appeal herein, and that the foregoing is a true copy of the transcript of record of the said District Court in the above-entitled matter, as agreed upon by the parties.

Dated, Brooklyn, New York, November —, 1938.

MICHAEL F. WALSH,

*United States Attorney,*

*Eastern District of New York,*

*Attorney for Defendant-Appellant.*

CARTER, LEDYARD & MILBURN,

*Attorneys for Plaintiff-Appellee.*

56 [Clerk's certificate to foregoing transcript omitted in printing.]

28 ALMON G. RASQUIN VS. GEORGE ARENTS HUMPHREYS

57 In United States Circuit Court of Appeals for the Second Circuit

No. 205—October Term, 1938

Argued Jan. 13, 1939. Decided Jan. 23, 1939

GEORGE ARENTS HUMPHREYS, PLAINTIFF-APPELLEE

v.

ALMON G. RASQUIN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE FIRST DISTRICT OF NEW YORK, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the Eastern District of New York

Before MANTON, SWAN, and AUGUSTUS N. HAND, Circuit Judges

James W. Morris, Asst. Atty. Gen., Sewall Key and Frederic G. Rita, Sp. Assts. to Atty. Gen., and Michael F. Walsh, U. S. Atty., and Frank J. Parker, Asst. U. S. Atty., both of Brooklyn, N. Y., for appellant.

Carter, Ledyard & Milburn, of New York City (Sidney W. Davidson and Allin H. Pierce, both of New York City, of counsel), for plaintiff-appellee.

*Opinion*

PER CURIAM.

Decision affirmed on the authority of Hesslein v. Hoey, 2 Cir., 91 F. 2d 534.

58 In United States Circuit Court of Appeals, Second Circuit

GEORGE ARENTS HUMPHREYS, PLAINTIFF-APPELLEE

vs.

ALMON G. RASQUIN, COLLECTOR, ETC., DEFENDANT-APPELLANT

*Judgment*

Filed Feb. 10, 1939

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, Clerk.

59 (File endorsement omitted.)

60 [Clerk's certificate to foregoing transcript omitted in printing.]

61 Supreme Court of the United States

*Order allowing certiorari*

Filed May 22, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument following No. 881, Estate of Charles Henry Sanford, Deceased, et al. vs. Commissioner of Internal Revenue.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] Enter: Attorney General. File No. 43,397. U. S. Circuit Court of Appeals, Second Circuit. Term No. 37. Almon G. Rasquin, Collector of Internal Revenue of the United States for the First District of New York, Petitioner, vs. George Arents Humphreys. Petition for writ of certiorari and exhibit thereto. Filed April 27, 1939. Term No. 37 O. T. 1939.

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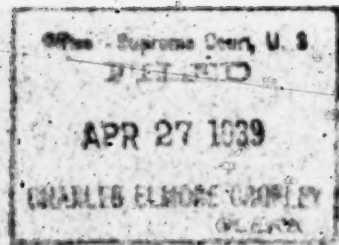


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**In the Supreme Court of the United States**

**OCTOBER TERM, 1938**

---

**ALMON G. RASQUIN, COLLECTOR OF INTERNAL REV-  
ENUE OF THE UNITED STATES FOR THE FIRST  
DISTRICT OF NEW YORK, PETITIONER**

**v.**

**GEORGE ARENTS HUMPHREYS**

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT**

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19

# **In the Supreme Court of the United States**

**OCTOBER TERM, 1938**

---

**ALMON G. RASQUIN, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES FOR THE FIRST DISTRICT OF NEW YORK, PETITIONER**

**v.**

**GEORGE ARENTS HUMPHREYS**

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT**

The Solicitor General, on behalf of Almon G. Rasquin, Collector of Internal Revenue for the First District of New York, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on February 10, 1939, affirming the decision of the District Court of the United States for the Eastern District of New York.

## **OPINIONS BELOW**

The District Court filed no opinion. The *per curiam* opinion of the Circuit Court of Appeals is reported in 101 F. (2d) 1012.

**JURISDICTION**

The judgment below was entered on February 10, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTION PRESENTED**

Whether an irrevocable *inter vivos* transfer in trust is taxable under the Gift Tax Act of 1932 as amended where the donor reserves the power to change the beneficiaries of the trust but may not by any such alteration or amendment increase his personal interest in the trust estate.

**STATUTES AND REGULATIONS INVOLVED**

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 7-10.

**STATEMENT**

The complaint (R. 12-16) alleges that on December 27, 1934, the respondent executed an indenture of trust to trustees named therein to whom he delivered certain property to be held by them upon the trusts raised in the indenture. A copy of the indenture is annexed to the complaint, marked Exhibit A. (R. 17-38.)

Paragraph SEVENTH of the indenture is as follows (R. 24):

This trust is hereby declared to be irrevocable and it shall not at any time, by any person or persons, be capable of modification in any manner, except that the Settlor

reserves the right, without the consent of the Trustees or of any beneficiary hereunder, at any time and from time to time during his life, by an instrument or instruments in writing under his hand and duly acknowledged so as to authorize it or them to be recorded in the State of New York, to alter and amend this Trust Deed to the extent of substituting for the beneficiaries named herein other beneficiaries and to prescribe the terms and conditions on which such other beneficiaries shall take an interest in the trust, but the Settlor shall not by any such alteration or amendment increase his personal beneficial interest in the trust estate.

On March 12, 1935, the respondent filed with the petitioner a gift tax return for the calendar year 1934 (R. 38-44, Ex. B, annexed to complaint) reporting the property conveyed pursuant to the indenture as a taxable gift of the value of \$263,201.71 and a tax thereon in the amount of \$11,181.14, which he paid to the petitioner on March 12, 1935.

On February 17, 1938, the respondent filed a claim for refund of the amount paid (R. 44-49, Ex. C, annexed to complaint) based on the allegation that the transfer pursuant to the trust indenture did not constitute an actual gift taxable under the Gift Tax Act of 1932. On March 11, 1938, the claim was rejected (R. 50-51, Ex. D, annexed to complaint).

A motion for summary judgment (R. 8) under the provisions of Rule 113, Rules of Civil Practice,

was made by respondent on June 29, 1938, upon respondent's affidavit (R. 9-11) verifying the cause of action set up in the complaint.

No papers were filed in opposition, petitioner's counsel stating to the court upon the hearing that the case was apparently indistinguishable from *Hesslein v. Hoey*, 91 F. (2d) 954 (C. C. A. 2d).

On July 13, 1938, an order was made granting the motion for summary judgment and judgment was accordingly entered in favor of respondent on July 14, 1938 (R. 5-7.) On appeal, the court below affirmed *per curiam* on the authority of *Hesslein v. Hoey*, *supra*.

#### **SPECIFICATION OF ERRORS TO BE URGED**

The Circuit Court of Appeals erred:

1. In holding that the transfer in trust here in issue, by the terms of which the settlor reserved the power to alter or amend the trust deed by substituting other beneficiaries for the beneficiaries named and to prescribe the terms and conditions on which such other beneficiaries shall take an interest in the trust but without the power to increase his personal beneficial interest in the trust estate, is not such a transfer as is subject to tax under the gift-tax provisions of the Revenue Act of 1932, as amended; and in failing to hold that the transfer in trust here in issue is subject to tax under the gift-tax provisions of the Revenue Act of 1932, as amended.

2. In affirming the judgment of the District Court.

## REASONS FOR GRANTING THE WRIT

The question involved in the present case and the Government's position with regard thereto are the same as in *Hesslein v. Hoey*, 91 F. (2d) 954 (C. C. A. 2d), certiorari denied, 302 U. S. 756. The same general question is also presented in *Estate of Charles Henry Sanford v. Commissioner*, No. 881, present Term, in which the Government has filed a memorandum not opposing certiorari. The Government's position in the latter case is inconsistent with its position in the present case, in the *Sanford* case its contention being that a transfer in trust is not a completed gift for the purposes of the gift tax until there is a relinquishment of the power to change the beneficial interests, although such power could not have been exercised in favor of the settlor of the trust, and in the present case its contention being that a taxable gift occurs where there is an irrevocable transfer in trust with the power to change beneficiaries but without the power to increase the settlor's personal beneficial interest in the trust.

The Government has been forced to this inconsistency of position because of the doubt as to the correctness of the *Hesslein* decision and because of the refusal of the taxpayer in the *Sanford* case, *supra*, to accept that decision as a correct statement of the law and because of the probabilities that other taxpayers also will not accept the *Hesslein* decision where it is not to their interest to do so.

The varying positions taken by both the taxpayers and the Government have created confusion in the administration of the statutory provision here involved, the question is a live one, and it is important from an administrative standpoint that it be settled by this Court.

Wherefore, it is respectfully submitted that this petition should be granted.

ROBERT H. JACKSON,  
*Solicitor General.*

APRIL, 1939.

## APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

**SEC. 511. GIFTS OF PROPERTY SUBJECT TO POWER.**

Subsection (c) of section 501 of the Revenue Act of 1932 (relating to the inapplicability of gift tax in the case of the transfer of property in trust subject to the power of the donor to revest title in himself) is repealed. (U. S. C., Title 26, Sec. 550.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

**SEC. 402. CREDITS AGAINST TAX.**

\* \* \* \* \*

(b) (1) If a tax has been paid under Title III of this Act on a gift, and thereafter upon the death of the donor any amount in respect of such gift is required to be included in the value of the gross estate of the decedent for the purposes of this title, then there shall be credited against the tax imposed by section 401 of this Act the amount of the tax paid under such Title III with respect to so much of the property which constituted the gift as is included in the gross estate, except that the amount of such credit (A) shall not exceed an amount which bears the same ratio to the tax imposed by section 401 of this Act as the value (at the time of the gift or at the time of the death, whichever is lower) of so much of the property which constituted the gift as is included in the gross estate, bears to the value of the entire gross estate, and (B) shall not exceed the amount by which the gift tax paid under Title III

of this Act with respect to so much of the property as constituted the gift as is included in the gross estate, exceeds the amount of the credit under section 301 (b) of the Revenue Act of 1926, as amended by this Act.

\* \* \* \* \*

(U. S. C., Title 26, Sec. 536.)

**SEC. 501. IMPOSITION OF TAX.**

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

(c) The tax shall not apply to a transfer of property in trust where the power to re-vest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift.

(U. S. C., Title 26, Sec. 550.)

**Revenue Act of 1926, c. 27, 44 Stat. 9:**

**—SEC. 302.** The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

\* \* \* \*

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in the case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of \$5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title;

\* \* \* \*

(U. S. C., Title 26, Sec. 411.)

**Treasury Regulations 79, promulgated under the Revenue Act of 1932:**

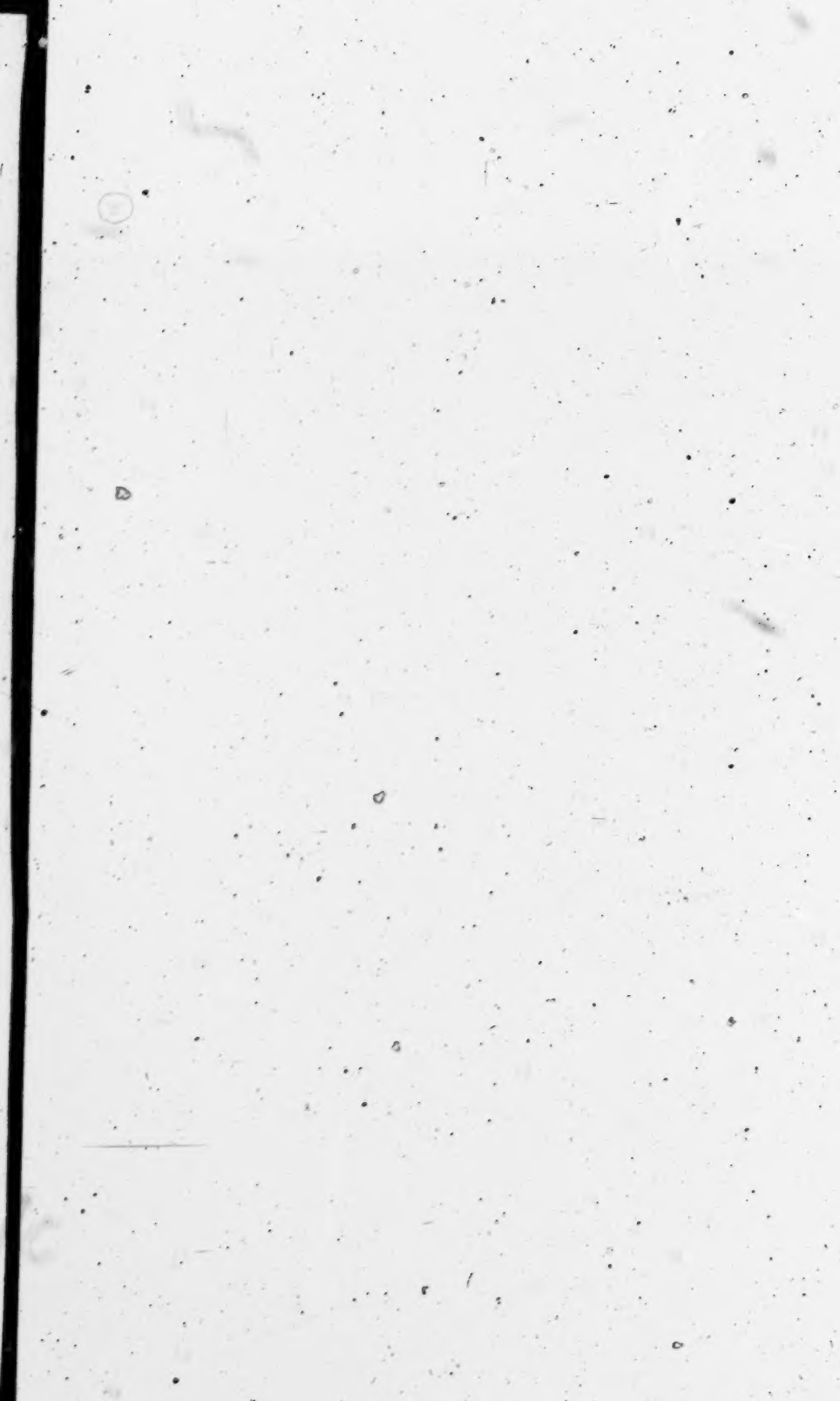
**ART. 3. *Transfers in trust.***—Where property is transferred in trust without an ade-

quate and full consideration in money or money's worth and without the reservation of the power to revest in the donor title to such property, the transfer is a gift, but, where the donor reserves such power, the transfer does not constitute a gift within the meaning of the statute. \* \* \*

**Treasury Regulations 79 (1936 Edition):**

**ART. 3. *Cessation of donor's dominion and control.***—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

\* \* \* \* \*





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CHARLES E. GOSLEY  
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1938

ALMON G. RASQUIN, COLLECTOR OF INTERNAL REVENUE OF THE  
UNITED STATES FOR THE FIRST DISTRICT OF NEW YORK,

*Petitioner,*

v.

GEORGE ARENTS HUMPHREYS,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF FOR THE RESPONDENT IN OPPOSITION

✓ SIDNEY W. DAVIDSON,  
✓ ALLIN H. PIERCE,

*Attorneys for Respondent.*



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1938.

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**No. 912.**

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ALMON G. RASQUIN, Collector of Internal Revenue of the  
United States for the First District of  
New York, Petitioner,

v.

GEORGE ARENTS HUMPHREYS.

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT.

---

**BRIEF FOR THE RESPONDENT IN OPPOSITION.**

**Opinions Below.**

The United States District Court did not file an opinion. The *per curiam* opinion of the Circuit Court of Appeals (R. 57), affirming the District Court's decision, is reported in 101 F. (2d) 1012.

**Jurisdiction.**

The judgment of the Circuit Court of Appeals was entered on February 10, 1939 (R. 57-58). The petition for a writ of certiorari was filed on April 27, 1939. The

jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### **Question Presented.**

Did the creation of a trust, under which the settlor reserved to himself (1) the trust income for his life and (2) the right to alter and amend the trust indenture in such manner as to change the beneficiaries and prescribe the terms and conditions under which other beneficiaries might take an interest in the trust, without increasing his own personal beneficial interest, constitute a completed gift of the remainder interests, within the meaning of the Gift Tax Act of 1932 as amended?

### **Statutes and Regulations Involved.**

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 14-16.

### **Statement.**

The facts of the case are set forth in the pleadings and the affidavit supporting the complaint, on which the District Court granted the taxpayer's motion for summary judgment. They may be summarized as follows:

On December 27, 1934, the taxpayer created a trust of certain securities, with directions to the trustees to pay the net income to the settlor for his life, and upon his death to distribute the income and principal to the persons named in the trust indenture (R. 12, 17-19). Article SEVENTH of the trust indenture provided as follows (R. 24):

"This trust is hereby declared to be irrevocable and it shall not at any time, by any person or persons, be capable of modification in any manner, except that

the Settlor reserves the right, without the consent of the Trustees or of any beneficiary hereunder, at any time and from time to time during his life, by an instrument or instruments in writing under his hand and duly acknowledged so as to authorize it or them to be recorded in the State of New York, to alter and amend this Trust Deed to the extent of substituting for the beneficiaries named herein other beneficiaries and to prescribe the terms and conditions on which such other beneficiaries shall take an interest in the trust, but the Settlor shall not by any such alteration or amendment increase his personal beneficial interest in the trust estate."

On March 12, 1935, the taxpayer filed with the petitioner a federal gift tax return for the year 1934 (R. 38-44, 52) on which he reported that, by means of the trust indenture, he had made a taxable gift of the remainder interests in the trust; and he paid a gift tax thereon of \$11,181.14 (R. 52).

On February 17, 1938, the taxpayer filed a claim for refund of the tax paid, based on the ground that he had not made a taxable gift by means of said trust indenture (R. 44-49, 52). The claim was rejected (R. 50-51). Thereupon the taxpayer instituted suit against the petitioner in the United States District Court for the Eastern District of New York (R. 12).

On July 13, 1938, the District Court granted the motion of the taxpayer for summary judgment pursuant to Rule 113 of the New York Rules of Civil Practice (R. 5-6). On the following day judgment was entered for the taxpayer in the amount of \$11,181.14 with interest and costs (R. 7).

On January 23, 1939, the Circuit Court of Appeals for the Second Circuit affirmed the District Court's decision *per curiam* (R. 57) on the authority of *Hesslein v. Hoey*, 91 F. (2d) 954 (C. C. A. 2d, 1937), certiorari denied 302 U. S. 756 (1937).

## ARGUMENT.

### I.

#### There is no conflict of decisions.

The principal reasons assigned by the petitioner for granting a writ of certiorari in this case are that the Government has taken inconsistent positions with respect to the general question decided below, and that it is not opposing the petition for certiorari filed by the taxpayer in *Estate of Sanford v. Commissioner*, No. 881, present term. No review is presented of the several decisions on the question by the Circuit Courts of Appeals, the District Courts, and the Board of Tax Appeals. No argument is advanced that these decisions are erroneous, or that there is any reasonable justification for the Government's inconsistency. No claim is made that there is any conflict of decisions to be resolved by this court; and clearly there is none.

The first reported case which involved the general question here presented is *Hesslein v. Hoey*, 18 F. Supp. 169 (S. D. N. Y.—January, 1937), affirmed 91 F. (2d) 954 (C. C. A. 2nd—July, 1937), certiorari denied 302 U. S. 756 (December, 1937). In that case the taxpayer created a trust of personal property with directions to the trustee to pay the income to named beneficiaries during the life of the survivor of the settlor and his wife, and thereafter to distribute the principal to the persons named in the trust indenture, or to persons whom the settlor might appoint by his will if he survived his wife. The settlor expressly reserved to himself the power to change the beneficiaries of income and principal and to alter the trust in any manner not beneficial to the settlor or his estate.

The District Court held in the *Hesslein* case that the reservation of the foregoing power prevented the trans-

fer to the trustee from constituting a completed taxable gift. It supported that holding with a well-reasoned opinion in which it examined the legislative history of the Gift Tax Act and reviewed the opinions of this court and other courts in which the general concept of a gift, recognizable for tax purposes, has been considered. On appeal by the Government, the District Court's decision was affirmed, with one dissent, by the Circuit Court of Appeals for the Second Circuit. This court denied the Government's petition for a writ of certiorari.

The *Hesslein* case has been uniformly followed by the courts and the Board of Tax Appeals in all similar cases. In addition to the present case, which was decided by the District Court for the Eastern District of New York and affirmed by the Circuit Court of Appeals for the Second Circuit, see *Estate of Sanford v. Commissioner*, — F. (2d) — (C. C. A. 3rd—March, 1939), affirming B. T. A. Memo Op., certiorari applied for; *Blodgett v. Hoey* (S. D. N. Y.—February, 1939), unreported; *Cushman v. Hoey* (S. D. N. Y.—November, 1938), reported in 1938 Prentice Hall Tax Service, Par. 5.755; *John S. Mack v. Commissioner*, 39 B. T. A. Advance Sheet No. 33 (January, 1939); *Harriet W. Rosenau v. Commissioner*, 37 B. T. A. 468 (March, 1938). The *Mack* case, *supra* which is the most recent decision of the Board of Tax Appeals on the subject, extensively reviews the issue and reaches conclusions which are in complete accord with those in the *Hesslein* case.

The petition for certiorari filed in the *Sanford* case, *supra*, No. 881, present term, alleges that the decision of the Circuit Court of Appeals for the Third Circuit is in conflict with *Burnet v. Guggenheim*, 288 U. S. 280 (1933) and with *Helvering v. Reynolds Tobacco Co.*, No. 328, decided January 30, 1938. No similar claim is made by the Government in the present case; and the claim of conflict is clearly without merit.

The *Guggenheim* case is discussed in the following section of this argument and only brief comment is made

here. In that case it was held that the creation of a trust under which the settlor reserved powers to modify, alter or revoke did not constitute a completed gift, but that the gift was made when *all* of the settlor's reserved powers were surrendered. In the *Sanford* case, it was held that neither the creation of the trust with broad reserved powers in the settlor nor the mere modification of those powers constituted a completed gift, but that the gift was made when the settlor's reserved powers were entirely relinquished. In the present case, it similarly was held that there was no completed gift, because here broad powers were reserved to the settlor upon the creation of the trust and none of those powers were surrendered. Obviously, these decisions are not in conflict.

The *Reynolds* case held that where the administrative construction of a statute had been uniform for a long period and had been embodied in Treasury regulations that were impliedly approved by re-enactment of the statute, an attempt to amend those regulations retroactively was ineffective. No similar situation exists either in the *Sanford* case or in the instant case. Here there was no uniform administrative construction of the applicable statute; that is evidenced by the vacillating positions of the Bureau of Internal Revenue which are reviewed on page 3 of the petition for certiorari in the *Sanford* case. Also, no Treasury regulation declares a gift tax to be payable while the taxpayer retains broad powers of dominion and control which permit him, at his unfettered command, to shift the beneficial interests in the property from one tentatively selected donee to another. Article 3 of Regulations 79 was never intended to declare, by implication, a gift in every irrevocable transfer of legal title without consideration; such transfer there would be if the trustees were to hold the property for the use of the grantor. As this court stated in *Burnet v. Guggenheim, supra* (p. 287), "Congress was aware that what was the essence of a trans-

fer had come to be identified more nearly with a change of economic benefits than with technicalities of title."

The fact that the Government does not claim any conflict of decisions supports the respondent's position that there is none.

## II.

**The decision below is in accord with the opinions of this court in *Porter v. Commissioner* and *Burnet v. Guggenheim*.**

In *Porter v. Commissioner*, 288 U. S. 436 (1933), the question presented was whether the creation of trusts in 1918 and 1919, under which the settlor reserved to himself powers substantially similar to those reserved by the settlor in the instant case, prevented the trust property from being included in the settlor's estate and subjected to estate tax in the year 1926. The decision sustained the estate tax and turned principally upon the construction of Section 302 (d) of the Revenue Act of 1926. However, this court pointed out that the broad powers of dominion and control reserved to the settlor prevented the transfer to the trustees from being a completed gift. This court said (pp. 443-444):

"Here the donor retained until his death power enough to enable him to make a complete revision of all that he had done in respect of the creation of the trusts even to the extent of taking the property from the trustees and beneficiaries named and transferring it absolutely or in trust for the benefit of others. So far as concerns the tax here involved, there is no difference in principle between a transfer subject to such changes and one that is revocable. . . .

"They [the petitioners] treat as without significance the power the donor reserved unto himself alone and ground all their arguments upon the fact that de-

ceased, prior to such enactment, completely divested himself of title without power of revocation. It is true that the power reserved was not absolute as in the transfer considered in *Burnet v. Guggenheim*, *supra*. . . . But the reservation here may not be ignored, for, while subject to the specified limitation, it made the settlor dominant in respect of other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calculation to ascertain the amount of what in § 301 is called the net estate."

The *Porter* case takes on particular significance when one observes that the trusts there involved were created in 1918 and 1919, and that they could not constitutionally have been subjected to estate tax under the provisions of section 302 (d) of the Revenue Act of 1926, if they had constituted completed transfers at the time of their creation. *Helvering v. Helmholz*, 296 U. S. 93 (1935); *White v. Poor*, 296 U. S. 98 (1935); *Nichols v. Coolidge*, 274 U. S. 531 (1927).

The case of *Burnet v. Guggenheim*, 288 U. S. 280 (1933), should be considered here in conjunction with the *Porter* case, because that decision establishes the similarity of the gift tax and the estate tax, and also the similarity in the concept of a completed gift under the two statutes which impose those taxes.

In the *Guggenheim* case, the taxpayer in 1917 executed two deeds of trust under which he reserved to himself power to modify, alter or revoke the trusts. In 1925 he surrendered that power, and the Government thereupon imposed a gift tax under the Gift Tax Act of 1924 which so far as material is substantially the same as the applicable statute in the instant case. This court held that the gift tax was properly imposed at the time when the power

of revocation was relinquished and that there had been no prior completed gift, notwithstanding the transfer of legal title to the trustees in 1917. Mr. Justice Cardozo, speaking for the court said (pp. 286-288):

"The tax upon gifts is closely related both in structure and in purpose to the tax upon those transfers that take effect at death. . . . The gift tax is Part II of Title III of the Revenue Act of 1924; the Estate Tax is Part I of the same title. The two statutes are plainly *in pari materia*. There has been a steady widening of the concept of a transfer for the purpose of taxation under the provisions of Part I. (Citing cases.) There is little likelihood that the law-makers meant to narrow the concept, and to revert to a construction that would exalt the form above the substance, in fixing the scope of a transfer for the purposes of Part II. We do not ignore differences in precision of definition between the one part and the other. They cannot obscure identities more fundamental and important. The tax upon estates, as it stood in 1924, was the outcome of a long process of evolution; it had been refined and perfected by decisions and amendments almost without number. The tax on gifts was something new. Even so, the concept of a transfer, so painfully developed in respect of taxes on estates, was not flung aside and scouted in laying this new burden upon transfers during life. Congress was aware that what was of the essence of a transfer had come to be identified more nearly with a change of economic benefits than with technicalities of title. The word had gained a new color, the result, no doubt in part, of repeated changes of the statutes, but a new color none the less. (Citing cases.)

"The respondent finds comfort in the provisions of § 302 (d) of the Act of 1924, governing taxes on estates. He asks why such a provision should have been placed in Part I and nothing equivalent inserted in Part II, if powers for purposes of the one tax were to be treated in the same way as powers for the purposes of the other. . . . No doubt the draftsman of the statute would have done well if he had been equally explicit in the drafting of Part II. This is not to say that meaning has been lost because extraordinary foresight would have served to make it clearer."

With reference to the incompleteness of the gift, prior to the relinquishment of the power of revocation, this court said (pp. 284-286):

"\* \* \* While the powers of revocation stood uncanceled in the deeds, the gifts, from the point of view of substance, were inchoate and imperfect. \* \* \* By the execution of deeds and the creation of trusts, the settlor did indeed succeed in divesting himself of title and transferring it to others (citing cases), but the substance of his dominion was the same as if these forms had been omitted. *Corliss v. Bowers* [281 U. S. 376, 378] \* \* \*

"\* \* \* Did Congress have in view the present payment of a tax upon the full value of the subject matter of this imperfect and inchoate gift? The statute provides that upon a transfer by gift the tax upon the value shall be paid by the donor (citing statute), and shall constitute a lien upon the property transferred. (Citing statute.) By the act now in force, the personal liability for payment extends to the donee. (Citing statute.) A statute will be construed in such a way as to avoid unnecessary hardship when its meaning is uncertain. (Citing cases.) Hardship there plainly is in exacting the immediate payment of a tax upon the value of the principal when nothing has been done to give assurance that any part of the principal will ever go to the donee. The statute is not aimed at every transfer of the legal title without consideration. Such a transfer there would be if the trustees were to hold for the use of the grantor. It is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall."

The foregoing statements give emphasis to the fundamental principle that in order to have a valid gift there must be a donee. When *Porter v. Commissioner, supra*, was before the Circuit Court of Appeals for the Second Circuit, (60 F. (2d) 673), that court said (p. 674):

"A gift is a bilateral transaction and demands a donee as well as a donor; it is incomplete though the donor has parted with his interest, if the donee remains indeterminate, and the beneficiaries are determined only when the power to change them ends."

The reasonable conclusions to be drawn from the opinions in the *Porter* and *Guggenheim* cases are: (1) that the concept of a gift is substantially the same for gift tax as for estate tax; (2) that a transfer which is subject to reserved powers in the transferor, such as those reserved to the settlor in the instant case, is no different in principle from a revocable transfer; and (3) that such a transfer, like a revocable transfer, is not sufficiently complete either to prevent the imposition of estate tax or to permit the imposition of gift tax.

The decisions below are in complete accord with the opinions of this court.

### III.

The petition in the instant case, because of differences of fact, should be considered independently from the petition in the *Sanford* case.

The petitioner herein has filed no supporting brief. He has stated that the same general question is presented in the *Estate of Sanford v. Commissioner*, No. 881, present term, and that the Government is not opposing certiorari in that case. The implication is that if certiorari is granted in the *Sanford* case, the petition in the present case should also be granted as a matter of course.

Such conclusion does not follow. The decisions in both the *Sanford* case and the instant case rest upon *Hesslein v. Hoey*, *supra*, in which this court denied certiorari, but the facts in the two cases differ widely. Further, the reasons assigned for granting the writ in the *Sanford* case and the argument presented in support thereof are not here applicable.

In the *Sanford* case, the settlor directed that the trust income be paid to persons other than himself. During the taxable year involved, he had no power to recover that income for his own personal use. The petitioner there

argues (p. 4) that if the gift tax does not arise until the settlor has surrendered his powers to change the beneficiaries and alter the trusts, the result will be that not only will the gift tax be postponed, but the settlor will avoid income tax on the trust income.

However, in the instant case the settlor retained all right to the trust income, and he admittedly is taxable thereon for income tax purposes. The present case presents no question of tax avoidance. As for the postponement of gift tax, it seems incredible, as was suggested by this court in *Burnet v. Guggenheim, supra* (p. 285), that Congress intended to levy a gift tax, place a lien upon the property conveyed to the trustee, and imposed secondary liability on the donee, while the transfer of beneficial interest remained imperfect and inchoate and while the tentatively designated donee had no assurance that he ever would acquire any part of the principal.

The determination of a completed gift must, of necessity, turn upon the nature and extent of the rights conveyed, for as was suggested by this Court in *Porter v. Commissioner, supra* (p. 443), every reserved power, however trivial, need not be considered. Here, the donor retained all of the substantial beneficial interests in the trust property. He was entitled to all of the income for his life, but he could substitute other beneficiaries and retain the right to make further substitutions. Without the consent of the trustees or of any beneficiary, he could terminate the interests of those who were tentatively designated to take the principal after his death, substitute other beneficiaries, and prescribe new terms under which they might participate. He retained power enough to enable him to make practically a complete revision of all that he had done in respect of the creation of the trusts.

Regarding the remainder interests, upon which the tax is claimed, the settlor surrendered practically no right except that of designating the remaindermen by will rather than by deed. In the *Sanford* case, the rights surrendered by the settlor were much more substantial.

### Conclusion.

The petition filed here is in effect a mere renewal of the petition which the Government filed in *Hesslein v. Hoey, supra*, and in which this court denied certiorari in December, 1937. In the period which has intervened no conflicting decision or dissenting opinion has been filed. On the contrary the Second Circuit has reaffirmed its decision, and the Third Circuit, the district courts and the Board of Tax Appeals have concurred. The decision below is in accord with opinions of this court.

The petition for certiorari filed in the instant case does not result from any lack of judicial opinion or from any conflict of decisions upon the question presented, but rather from the Government's refusal to recognize and follow the several opinions and decisions which have heretofore been filed. If the petitions in the *Sanford* case and the instant case are denied, as was the petition filed in the *Hesslein* case, it seems probable that the question may be settled without further consideration by this court.

The petition for certiorari should be denied.

Respectfully submitted,

SIDNEY W. DAVIDSON,

ALLIN H. PIERCE,

Attorneys for Respondent,

No. 2 Wall Street,

New York, New York.

May 10, 1939.

CARTER, LEDYARD & MILBURN,

of Counsel.

## APPENDIX.

### Statutes and Regulations Involved.

Gift Tax Act of 1932, c. 209, 47 Stat. 169:

#### Sec. 501. Imposition of Tax.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a non-resident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

(c) The tax shall not apply to a transfer of property in trust where the power to revest in the donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift. (U. S. C., Title 26, Sec. 550.)

[Subdivision (c) of Section 501 was repealed by Section 511 of the Revenue Act of 1934, c. 277, 48 Stat. 680].

#### Sec. 510. Lien for Tax.

The tax imposed by this title shall be a lien upon all gifts made during the calendar year, for ten years

from the time the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift. • • •

Revenue Act of 1926, c. 27, 44 Stat. 9:

### TITLE III—ESTATE TAX

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—  
• • • • •

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. • • •

Treasury Regulations 79, promulgated under the Revenue Act of 1932 (1933 Edition):

Art. 3. *Transfers in trust.*—Where property is transferred in trust without an adequate and full consideration in money or money's worth and without the reservation of the power to revest in the donor title to such property, the transfer is a gift, but, where the donor reserves such power, the transfer does not constitute a gift within the meaning of the statute. The relinquishment or termination, without an adequate and full consideration in money or money's worth, of the power to revest in the donor title to property transferred in trust, is a gift of such property at the time of the relinquishment or termination of the power, except where the power is terminated by the donor's death. The payment of income to a beneficiary of a trust, other than the donor, is a gift of such income where the donor has the power to

revest in himself title to the trust property. For the purposes of these regulations a donor shall be considered as having the power to revest in himself title to the property transferred in trust where he has such power in conjunction with any person not having a substantial adverse interest in the disposition of the trust property or the income therefrom. A trustee, as such, is not a person having a substantial adverse interest in the disposition of the trust property or the income therefrom. • • •





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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1939.

No. 37.

ALMON G. RASQUIN, Collector of Internal Revenue of  
the United States for the First District of New York,  
*Petitioner,*

—VS.—

GEORGE ARENTS HUMPHREYS,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

**BRIEF FOR THE RESPONDENT.**

SIDNEY W. DAVIDSON,  
ALLIN H. PIERCE,  
*Counsel for the Respondent.*



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1939.  
**No. 37.**

---

ALMON G. RASQUIN, Collector of Internal Revenue of  
the United States for the First District of New  
York,

*Petitioner,*

—vs.—

GEORGE ARENTS HUMPHREYS,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

---

**BRIEF FOR THE RESPONDENT.**

***Opinions Below.***

The District Court delivered no opinion.

The Circuit Court of Appeals for the Second Circuit affirmed the judgment below by a *per curiam* opinion (R. 28) reported *sub nom. Humphreys v. Rasquin*, in 101 F. (2d) 1012.

***Jurisdiction.***

The judgment of the Circuit Court of Appeals was entered February 10, 1939 (R. 28-29). The petition for certiorari was filed April 27, 1939, and was granted May 22, 1939 (R. 29). The jurisdiction

of this court rests on section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

### ***Question Presented.***

Did Mr. Humphreys, the respondent in this court, make a taxable gift within the meaning of the Gift Tax Act of 1932 as amended, when he transferred certain securities in trust reserving (1) all the trust income for his life, and (2) the right, without the consent of the trustees or of any beneficiary, at any time and from time to time during his life, by an instrument or instruments in writing, to alter and amend the indenture of trust to the extent of substituting other beneficiaries and prescribing the terms and conditions on which such other beneficiaries should take an interest in the trust, without increasing his personal beneficial interest in the trust estate?<sup>1</sup>

### ***Statutes Involved.***

The statutes involved are set forth in the Appendix, *infra*, pages 23 to 26.

### ***Statement.***

This action was instituted in April, 1938, in the United States District Court for the Eastern District of New York against the Collector of Internal Rev-

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<sup>1</sup> The Collector of Internal Revenue as petitioner does not claim that the transfer to the trustees effected any gift of the settlor's life estate; but he does contend that such transfer effected a taxable gift of the remainder. His contention was rejected by both the District Court and the Circuit Court of Appeals.

enue for the First District of New York for refund of federal gift tax paid for the year 1934. The plaintiff George Arents Humphreys, who is the respondent in this court, filed a motion for summary judgment pursuant to Rule 113 of the New York Rules of Civil Practice (R. 4-6). The District Court granted the motion (R. 2-3) and entered judgment for the plaintiff for \$11,181.14 plus interest and costs (R. 3-4). The Circuit Court of Appeals for the Second Circuit affirmed *per curiam* the judgment of the District Court (R. 28-29).

The facts are not disputed. They appear in the complaint (R. 6-8) and the exhibits attached thereto (R. 8-26) as follows:

On December 27, 1934, Mr. Humphreys transferred certain securities to trustees subject to an indenture of trust (R. 6, 8-20) the material provisions of which are articles FIRST and SEVENTH.

Article FIRST of the indenture of trust (R. 9-10) in substance directs the trustees to pay over the net income of the trust to the settlor until his death; and upon his death to retain the corpus of the trust for the benefit of, or to convey it to, various persons named or described who shall survive the settlor, or in default of such persons to certain distributees of the settlor under New York law.

Article SEVENTH provides (R. 12-13):

"This trust is hereby declared to be irrevocable and it shall not at any time, by any person or persons, be capable of modification in any manner, except that the Settlor reserves the right, without the consent of the Trustees or of any

beneficiary hereunder, at any time and from time to time during his life, by an instrument or instruments in writing under his hand and duly acknowledged so as to authorize it or them to be recorded in the State of New York, to alter and amend this Trust Deed to the extent of substituting for the beneficiaries named herein other beneficiaries and to prescribe the terms and conditions on which such other beneficiaries shall take an interest in the trust, but the Settlor shall not by any such alteration or amendment increase his personal beneficial interest in the trust estate."

On March 12, 1935, the respondent Mr. Humphreys filed with the petitioner a federal gift tax return for the year 1934 (R. 6-7, 20-22), in which he reported that by creating the trust mentioned he had made a taxable gift of the remainder interest in the trust. He paid a gift tax thereon of \$11,181.14 (R. 7, 26-27).

Thereafter, Mr. Humphreys filed a claim for refund of the tax paid, with interest, based on the ground that no taxable gift had been effected by creation of the trust (R. 7, 23-25, 27). The claim was rejected (R. 8, 25-26). Thereupon this suit was instituted against the Collector (R. 1).

## **ARGUMENT.**

### ***Introductory Statement.***

The Government has filed a single brief in this case and in the case of *Estate of Sanford v. Commissioner* (No. 34, October, 1939 term), 103 F. (2d) 81 (C. C. A. 3d, March, 1939), affirming 37 B. T. A. 1334 (April, 1934, memo. op.). The brief reveals that in

cases involving a transfer in trust similar to the present one, the Bureau of Internal Revenue has maintained no consistent position in the construction of the gift tax law. The Bureau has continued to vacillate in its dealings with taxpayers notwithstanding the fact that the courts and the Board of Tax Appeals have adopted a uniform construction in all like cases, including three cases decided by the Circuit Courts of Appeals, namely the present case, the *Sanford* case, and *Hesslein v. Hoey*, 18 F. Supp. 169 (S. D. N. Y. 1937), *affd.* 91 F. (2d) 954 (C. C. A. 2d, 1937); *cert. denied*, 302 U. S. 756 (1937).

Both sides of the question are presented in the Government's brief. It sets forth many of the points which we would have advanced in support of the decision of the Circuit Court of Appeals for the Second Circuit in the present case, and of the decision of the Circuit Court of Appeals for the Third Circuit in the *Sanford* case. (See particularly part II of the Government's brief, pp. 38-50.) We shall not repeat what is said there but shall confine ourselves to certain additional points which we believe this court should consider.

## POINT I.

The construction of the gift tax law which was applied below has received uniform judicial approval. The Government does not contend that such construction is erroneous, or that a change would affect its revenues or facilitate administration of the law. Such construction should not be disturbed.

The first decision on the general issue here presented was *Hesslein v. Hoey*, *supra*. At the time that case arose it was important that the issue be determined promptly. The Revenue Act of 1924 had imposed a tax on transfers by gift (section 319, 43 Stat. 313). That tax continued in effect during the years 1924 and 1925, but was repealed as of January 1, 1926, by section 1200(a) of the Revenue Act of 1926 (44 Stat. 125-126). On June 6, 1932, a gift tax was again imposed by the Revenue Act of 1932 (47 Stat. 245), and later the rates of tax were increased as of January 1, 1935 (Revenue Act of 1934, section 520, 48 Stat. 761). Taxpayers as well as the Treasury Department wished to know whether trusts such as that in the instant case which had been created prior to—and possibly in anticipation of—the enactment of the gift tax law or the upward revision of its rates constituted completed gifts. The amount of the gift tax (being computed on a sliding scale) depended upon whether prior taxable gifts had been made. Also, it was important to determine whether gift taxes which had been paid on the creation of trusts similar to that here involved were properly paid, and whether claims for refund should be filed within the prescribed statutory periods.

The District Court for the Southern District of New York held in the *Hesslein* case, *supra*, that a taxable gift did not result from a transfer in trust under which the settlor had retained powers to change the beneficiaries and to alter the time at which and the conditions under which other beneficiaries might acquire an interest in the trust, even though the settlor had so limited his reserved powers as to preclude him from increasing his own beneficial interest in the trust property. That decision was affirmed by the Circuit Court of Appeals for the Second Circuit on July 26, 1937, and a petition for certiorari filed by the Government was denied; *supra*, page 5. The decisions and briefs in the *Hesslein* case disclose that consideration was there given to practically the same arguments, statutes, regulations and legislative history as are now before this court in the present case. The *Hesslein* decisions were based in large measure upon the opinions of this court in *Burnet v. Guggenheim*, 288 U. S. 280 (1933) and *Porter v. Commissioner*, 288 U. S. 436 (1933).

The denial of certiorari in the *Hesslein* case was mentioned by the Circuit Court of Appeals for the Third Circuit as one of the factors which influenced its decision in the *Sanford* case (103 F. (2d) 81, 83). Further, such denial has been widely interpreted to mean that this court did not regard the decision of the Circuit Court of Appeals for the Second Circuit in the *Hesslein* case to be in conflict with the principles announced by this court in the *Guggenheim* and *Porter* cases. The *Hesslein* case has been recognized as the leading authority on the question here presented, and many taxpayers have undoubtedly adjusted their financial affairs in reliance upon it.

The *Hesslein* case has been uniformly followed by the courts and the Board of Tax Appeals. In addition to the present case and *Estate of Sanford v. Commissioner* (No. 34, October, 1939 term), *supra*, see *Blodgett v. United States* (S. D. N. Y., February, 1939), unreported, now on appeal to C. C. A. 2d; *Cushman v. Hoey* (S. D. N. Y., November, 1938), reported in 1938 Prentice Hall Federal Tax Service, Par. 5,755, now on appeal to C. C. A. 2d; *Mack v. Commissioner*, 39 B. T. A. 220 (January, 1939), now on appeal to C. C. A. 3d; *Moore v. Commissioner*, 39 B. T. A. 147 (January, 1939), now on appeal to C. C. A. 2d; *Roschau v. Commissioner*, 37 B. T. A. 468 (March, 1938). See also *First National Bank of Birmingham v. United States*, 25 F. Supp. 816, 818-819 (N. D. Ala. January, 1939).

There is no conflict of decisions.

The Solicitor General in his brief filed in the instant case has carefully weighed the arguments which he believes may be presented for and against the construction of the statute which the courts and the Board of Tax Appeals have adopted. He concludes that almost equally cogent arguments may be advanced in support of and against that construction (Br. 16, 50). He states that a decision either way will have no predictable effect upon the aggregate amount of the federal revenues. He does not contend that a change of construction will facilitate the administration of the gift tax law.

Thus, no adequate reason is presented for disturbing all existing judicial authority on the issue here involved or for reversing the decisions of the Circuit Courts of Appeals in the present case and in the *Sanford* case.

## POINT II.

The principles announced by this court in *Burnet v. Guggenheim* and in *Porter v. Commissipner* establish that the transfer in trust in this case does not constitute a transfer by gift within the meaning of the gift tax act.

Title III of the Revenue Act of 1932, as amended (*infra*, p. 23), imposes a tax upon "the transfer \* \* \* of property by gift \* \* \* whether the transfer is in trust or otherwise, whether the gift is direct or indirect \* \* \*." The statute does not otherwise define the essential characteristics of the transfer upon which the tax is laid.

The question whether a transfer in trust subject to reserved powers constitutes a taxable gift was before this court in *Burnet v. Guggenheim, supra*. The taxpayer had created trusts in 1917 and had reserved powers to modify, alter or revoke the trusts. There was no tax on gifts at that time, but in 1924 a gift tax was enacted as part of the Revenue Act of 1924 (*infra*, p. 23), which so far as material is substantially the same as the applicable statute in the instant case. In 1925 the taxpayer terminated his powers to modify, alter or revoke the trusts, and the Government thereupon asserted a gift tax under the 1924 Act. The taxpayer contended that the gifts were made in 1917 rather than in 1925.

The *Guggenheim* case is discussed at length in the Government's brief in the present case and in general we agree with the contentions made in part II of that brief (Br. 38-50). The Government relies on the *Guggenheim* case primarily to establish that the gift tax law and the estate tax law are *in pari materia*,

and to lay a foundation for the application of *Porter v. Commissioner, supra*. We submit that the *Guggenheim* case has another positive bearing on the instant case.

While the reserved powers in the *Guggenheim* case were broader than those here involved to the extent that the settlor could by exercising them increase his personal beneficial interest in the trust, the decision seems to be based not upon the extent of the reserved powers but upon the effects of those powers. This court said in that case:

"While the powers of revocation stood uncanceled in the deeds, the gifts, from the point of view of substance, were inchoate and imperfect." (p. 284)

"By the execution of deeds and the creation of trusts, the settlor did indeed succeed in divesting himself of title and transferring it to others (*Stone v. Hackett*, 12 Gray [Mass.] 227; *Van Cott v. Prentice*, 104 N. Y. 45; 10 N. E. 257; *National Newark & Essex Banking Co. v. Rosahl*, 97 N. J. Eq. 74; 128 Atl. 586; *Jones v. Clifton*, 101 U. S. 225), but the substance of his dominion was the same as if these forms had been omitted. *Corliss v. Bowers, supra*." (p. 284)

"As to the principal of the trusts and as to income to accrue thereafter, the gifts were formal and unreal. They acquired substance and reality for the first time in July, 1925, when the deeds became absolute through the cancellation of the power." (p. 284)

"Hardship there plainly is in exacting the immediate payment of a tax upon the value of the principal when nothing has been done to give

assurance that any part of the principal will ever go to the donee. The statute is not aimed at every transfer of legal title without consideration. \* \* \* It is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall." (pp. 285-286)<sup>2</sup>

"To lay the tax at once, while the deed is subject to the power, is to lay it on a gift that may never become consummate in any real or beneficial sense." (p. 288)

"What passed to the beneficiaries was \* \* \* an interest inchoate and contingent till rendered absolute and consummate through receipt or accrual before the act of revocation." (p. 289)

From the foregoing quotations it would appear that this court in its decision in the *Guggenheim* case gave weight to the facts that the settlor had not parted with dominion over his property; that he had given no assured economic benefit to any one; and that no absolute interest in his property had passed.

The same general effects as those reflected in the above quotations are present in the instant case, although flowing from the reservation of a more limited power. Here also the settlor has not parted with dominion over the trust property; he has assured no economic benefit to any one; and no absolute interest in his property has passed.

If this court had intended in the *Guggenheim* case to base its decision solely on the power of the settlor

<sup>2</sup> At page 43 of the brief for the petitioner in the *Sanford* case, counsel contend in substance that the clause "put beyond recall" means that the grantor can not "revest in himself title to the corpus of the trust". We do not agree with that construction. We submit that the clause is equally susceptible of the interpretation that the grantor has so transferred his property that he can no longer withdraw the benefit from the named cestui.

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to revest title in himself, it would seem to have been unnecessary to discuss the foregoing general effects. We submit that the principles laid down in the *Guggenheim* case are not confined in their application to transfers in which the settlor reserved a power of complete revocation, but are equally applicable to cases in which the reserved powers are more limited although—as here—substantial.

In *Porter v. Commissioner, supra*, this court considered in relation to the estate tax law a transfer in trust substantially identical with the instant one so far as the settlor's reserved powers are concerned. This case also has been discussed at length in the Government's brief and we are in general accord with the statements regarding it which appear on pages 41 and 42 of that brief.

We invite attention to the fact that the citation of *Helvering v. Helmholz*, 296 U. S. 93 (1935), on page 41 of the Government's brief should be supplemented by citation of *Nichols v. Coolidge*, 274 U. S. 531 (1927), which was decided prior to the *Porter* case. These cases hold that if the transfers by the settlors had been complete when made, the application of the estate tax to those transfers would have been retroactive and unconstitutional.

In the *Porter* case this court considered the effect of the settlor's power to change beneficiaries and said (p. 443):

"We need not consider whether every change, however slight or trivial, would be within the meaning of the clause. Here the donor retained until his death power enough to enable him to make a complete revision of all that he had done.

in respect of the creation of the trusts even to the extent of taking the property from the trustees and beneficiaries named and transferring it absolutely or in trust for the benefit of others. So far as concerns the tax here involved, there is no difference in principle between a transfer subject to such changes and one that is revocable.

\* \* \*

The decision in the *Porter* case turned in part upon the construction of section 302 (d) of the estate tax law (*infra*, p. 26) which specifically enumerates transfers in trust subject to powers to alter or amend. The gift tax law contains no corresponding provision. However, the answer to any suggestion that—by reason of this difference in the statutes—the above quotation is not pertinent in construing the gift tax law appears in the opinion of this court in the *Guggenheim* case (pp. 287-288):

“The respondent finds comfort in the provisions of § 302 (d) of the Act of 1924, governing taxes on estates. He asks why such a provision should have been placed in Part I [estate tax law] and nothing equivalent inserted in Part II [gift tax law], if powers for purposes of the one tax were to be treated in the same way as powers for the purposes of the other. \* \* \* No doubt the draftsman of the statute would have done well if he had been equally explicit in the drafting of Part II. This is not to say that meaning has been lost because extraordinary foresight would have served to make it clearer.”

The *Porter* case leaves no doubt that if the powers reserved to Mr. Humphreys as settlor in the instant case remain outstanding until his death, the trust property will be included in his estate for federal

estate tax purposes. Under the rule of the *Guggenheim* case a taxable gift will result if and when Mr. Humphreys terminates his reserved powers. Both the *Porter* case and the *Guggenheim* case indicate that no taxable gift was effected when Mr. Humphreys created his trust and reserved certain powers to alter or amend. This construction is the only one that will correlate the gift tax and estate tax statutes, which this court recognized in the *Guggenheim* case (p. 286) to be *in pari materia*.

### POINT III.

**The gift tax is laid only on transfers having the quality of a gift. The transfer in trust here involved does not have that quality.**

Under the gift tax law a transfer having the quality of a gift will not escape tax by reason of being in the form of a trust. The law provides that "The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect \* \* \*" (*infra*, p. 23). However, the statute does not attempt to tax as a gift every transfer in trust.<sup>3</sup> The test of taxability is whether the transfer has the quality of a gift rather than whether it effects a valid trust.<sup>4</sup>

<sup>3</sup> When used with reference to transfers in trust, the words "donor", "donees", and "gifts in trust" connote that a transfer in trust effects a gift and is subject to gift tax. Inexact use of these words should not be allowed to confuse the distinction mentioned above between a valid trust and a gift. In this connection see the use in other briefs filed in this case and the *Sanford* case of the word "donor" in the sense of the word "settlor"; "donees" in the sense of "beneficiaries" (Government Br. 21-22; *Sanford* Br. 19); and "gifts in trust" in the sense of "transfers in trust" (*Sanford* Br. 19).

<sup>4</sup> See the analysis by Judge Sanborn of transfers in trust as they are related to the gift tax in *Rheinstrom v. Commissioner*, 105 F. (2d) 642, 647 (C. C. A. 8th, 1939).

This court stated in *Burnet v. Guggenheim, supra* (p. 286):

"The statute is not aimed at every transfer of the legal title without consideration: Such a transfer there would be if the trustees were to hold for the use of the grantor. It is aimed at transfers of the title that have the quality of a gift \* \* \*."

The elements of a completed gift *inter vivos* have been determined in numerous decisions. *Edson v. Lucas*, 40 F. (2d) 398, 404 (C. C. A. 8th, 1930), is a leading Circuit Court case which reviews the authorities. The decisions are not in complete harmony as to all the necessary requirements of a completed gift but agree that among the essential elements are the following:

(1) There must be a donee capable of taking the gift;

(2) There must be an irrevocable relinquishment to the donee of dominion and control of the subject matter of the gift; and

(3) The transfer to the donee must be absolute and *in praesenti*.

In *Edson v. Lucas, supra*, the court said with respect to the concept of a completed gift (p. 404):

"A statement frequently found in the decisions is: 'To constitute a valid gift *inter vivos*, there must be a gratuitous and absolute transfer of the property from the donor to the donee, taking effect immediately and fully executed by a delivery of the property by the donor, and an acceptance thereof by the donee.'"

When *Porter v. Commissioner, supra*, was before the Circuit Court of Appeals for the Second Circuit, that court said (60 F. (2d) 673, 674):

"A gift is a bilateral transaction and demands a donee as well as a donor; it is incomplete though the donor has parted with his interest, if the donee remains indeterminate, and the beneficiaries are determined only when the power to change them ends."

In *City Bank Farmers Trust Co. v. Hoey*, 23 F. Supp. 831, 833 (S. D. N. Y., June, 1938), *affd.* 101 F. (2d) 9 (C. C. A. 2d), Judge Patterson said:

"In New York as generally elsewhere a transfer of property by gift is not effective until delivery by the donor. The delivery must be as perfect as the nature of the property and the surroundings of the parties will reasonably permit."

To the same effect see *Matter of Van Alstyne*, 207 N. Y. 298, 309 (1913).

The Government argues that "the completion of the transfer from the donor rather than the completion of the gift to particular donees is the decisive factor." (Br. 22). A similar argument is presented by the petitioner in the *Sanford* case (Br. 19). This implies that the transfer from the donor and the transfer to the donees are not contemporaneous, and that the foregoing elements of an *inter vivos* gift are not essential where a trust is employed as the instrumentality for effecting a transfer by gift.

We do not agree with that argument. It fails to recognize that the so-called "legal interest" or "property" which is the subject of the gift consists upon proper analysis of a complex aggregate of rights,

privileges, powers and immunities,<sup>5</sup> and that in certain instances all these rights, privileges, powers and immunities are not transferred or released simultaneously. Where a trust is used as the medium for effecting a gift, the grantor may by separate acts part with portions of his total bundle of rights, privileges, powers and immunities. He may first transfer the bare "legal title" to the trustee, reserving the income and the powers to alter, amend, or revoke. From time to time thereafter he may terminate his power to revoke, or he may modify his power to alter or his power to amend, or he may surrender his reservation of the income. By his first act, and by each subsequent act, the settlor accomplishes the transfer of portions of his "legal interest" or "property". However, these acts do not result in a taxable gift until the settlor has parted with enough of his bundle of rights, privileges, powers and immunities to fulfill the essential elements of a gift. The Government as petitioner in the present case (Br. 22); and the taxpayer as petitioner in the *Sanford* case (Br. 19), have erred in assuming that the initial transfer of rights, privileges, powers and immunities by a settlor results in a taxable gift even though the designation of beneficiaries is merely tentative.

This court described the gift tax in *Bromley v. McCaughn*, 280 U. S. 124, 136 (1929):

"It is a tax laid only upon the exercise of a

<sup>5</sup> See the articles by the late Professor Wesley Newcomb Hohfeld on *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale Law Journal, 16 (1913); and on *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale Law Journal, 710, 745-6 (1917); and by Professor Arthur L. Corbin on *Legal Analysis and Terminology*, 29 Yale Law Journal, 163, 173 (1919).

single one of those powers incident to ownership, the power to give the property owned to another."

Further we do not agree with the contention of the Government as petitioner in the present case that the language of the gift tax law "affords persuasive reason for believing that the completion of the transfer from the donor rather than the completion of the gift to particular donees is the decisive factor" (Br. 22). Section 501 of the statute (*infra*, p. 23) which imposes the gift tax refers neither to "donors" nor to "donees" but lays the tax upon "the transfer \* \* \* by gift".

Other sections of the statute show that Congress contemplated that the "transfer \* \* \* by gift" is a single transaction to which both the donor and the donee are parties. Section 504 (b) (*infra*, p. 24) provides that in the case of gifts other than of future interests made "to any person by the donor" during the calendar year, the first \$5,000 of such gifts "to such person" shall be excluded. Section 505 (*infra*, pp. 24-25) allows certain deductions for gifts made "to or for the use of" the United States and other public bodies for exclusively public purposes, or to charitable and eleemosynary organizations. While Section 509(a) (*infra*, p. 25) provides that the tax shall be paid by the donor, section 510 (*infra*, pp. 25-26) provides that if the tax is not paid when due, the donee shall be personally liable to the extent of the value of the gift.<sup>6</sup>

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<sup>6</sup> The petitioner in the *Sanford* case contends (*Sanford* Br. 20) that Article 1 of Regulations 67 (1924 ed.) prescribes the rule that a taxable gift occurs when the grantor of a trust terminates his power to revest title in himself although he retains substantial powers of modification.

We do not agree with that contention. The Regulations are

If a gift tax were due at the time of the creation of a trust in which the settlor reserved no life estate but did reserve the power to change the beneficiaries, the amount of the tax would have to be computed either

(1) without giving effect to the foregoing provisions of the statute which allow exclusions and deductions with respect to the number and character of the donees, or

(2) upon the theory that the tentatively designated beneficiaries are the donees within the purview of those provisions.

The first alternative would nullify the obvious intention of Congress to fix the burden of the gift tax with reference to the number and character of the donees, and would render ineffective the provision for secondary personal liability of donees. The second alternative would permit taxpayers to increase their exclusions by tentatively naming many beneficiaries (of interests other than future interests), and to avoid the gift tax altogether by tentatively naming a charity as the beneficiary of both present and future interests. It is inconceivable that Congress intended either alternative.

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<sup>6</sup> (Cont.)

silent on cases where the grantor, at the time of terminating his power to revest title in himself, reserves power to change the beneficiaries and otherwise modify or amend the trust indenture. We submit that these Regulations affords no aid in deciding the present issue. The Circuit Court of Appeals took this view in the *Sanford* case.

The provisions of the Regulations quoted at pages 25 and 26 of the Government's brief were first promulgated in 1936, more than a year subsequent to the transfer involved in this case.

Moreover, either alternative would create serious administrative problems. Assume that a settlor tentatively designated a charity as recipient of the income of a trust, and later amended the trust indenture so as to transfer the benefits from the charity to an individual. Would such transfer be free from gift tax? If it be answered that the gift tax would attach when the benefits were transferred to the individual, other questions would arise, for example: What remedy would be available if the settlor again shifted the benefits to a charity? Would the gift tax be refunded? Would such refund be made even though the statutory period for claiming a refund had expired? Such problems are inseparable from any attempt to impose a gift tax before the settlor has irrevocably designated the objects of his bounty.

The transfer in trust made by Mr. Humphreys does not contain the essential elements of a gift. By executing the trust indenture he did indeed succeed in divesting himself of "legal title", but he retained both the substance of his dominion and practically all the economic benefits, including the right to receive the income for his life and the right to determine who should enjoy the property upon his death. His power to designate the ultimate beneficiaries is limited only by the provision that he "shall not \* \* \* increase his personal beneficial interest in the trust estate" (R. 12-13). The trust indenture does not irrevocably specify whether the benefits of the trust property will ultimately be enjoyed by a charity, or by an individual, or by several charities and individuals. There would have been no gift in any aspect if Mr. Humphreys had attempted to attain the same result by the mere delivery of the securities into the

hands of the named beneficiaries. A power to change the beneficiaries accompanying delivery would have made the gift a nullity. Cf. *Burnet v. Guggenheim*, *supra* (p. 284).

Obviously, Mr. Humphreys did not do everything at his command to make as perfect a delivery of the beneficial interests in his property as the nature of these interests and the surrounding circumstances would reasonably have permitted. There was no transfer *in praesenti* of any absolute interest in either the life estate or the remainder. Accordingly, Mr. Humphreys' transfer in trust did not effect a taxable gift.

### **LAST POINT.**

***The decision of the Circuit Court of Appeals for the Second Circuit should be affirmed.***

Respectfully submitted,

SIDNEY W. DAVIDSON,

ALLIN H. PIERCE,

*Counsel for the Respondent.*

Dated, New York City, October 10, 1939.



## APPENDIX.

### Statutes Involved.

Revenue Act of 1924, c. 234, 43 Stat. 253, 313:

#### PART II—GIFT TAX

Sec. 319. For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly \* \* \*

Revenue Act of 1932, c. 209, 47 Stat. 169, 245, as amended by the Revenue Act of 1934, sections 511 and 517, c. 277, 48 Stat. 758, 760:

#### TITLE III—GIFT TAX

Sec. 501. Imposition of Tax.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a non-resident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The

tax shall not apply to a transfer made on or before the date of the enactment of this Act.

#### Sec. 504. Net Gifts.

(a) General Definition.—The term “net gifts” means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) Gifts Less Than \$5,000.—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first \$5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

#### Sec. 505. Deductions.

In computing net gifts for any calendar year there shall be allowed as deductions:

(a) Residents.—In the case of a citizen or resident—

\* \* \* \* \*

(2) Charitable, etc., gifts.—The amount of all gifts made during such year to or for the use of—

(A) the United States, any State, Territory or any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

(B) a corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals;

no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation:

(C) a fraternal society, order, or association, operating under the lodge system, but only if such gifts are to be used exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals;

(D) posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual;

(E) the special fund for vocational rehabilitation authorized by section 12 of the World War Veterans' Act, 1924.

#### Sec. 509. Payment of Tax.

(a) Time of Payment. The tax imposed by this title shall be paid by the donor on or before the 15th day of March following the close of the calendar year.

#### Sec. 510. Lien for Tax.

The tax imposed by this title shall be a lien upon all gifts made during the calendar year, for ten years from the time the gifts are made. If the tax is not paid when due, the donee of any

gift shall be personally liable for such tax to the extent of the value of such gift. \* \* \*

Sec. 532. Short Title.

This title may be cited as the "Gift Tax Act of 1932."

Revenue Act of 1926, c. 27, 44 Stat. 69, 70-71:

### TITLE III—ESTATE TAX

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

\* \* \* \* \*

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. \* \* \*





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# SUPREME COURT OF THE UNITED STATES.

No. 37. → OCTOBER TERM, 1939.

Almon G. Rasquin, Collector of Internal Revenue of the United States for the First District of New York, Petitioner,

vs.

George Arents Humphreys.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 6, 1939.]

Mr. Justice STONE delivered the opinion of the Court.

Decision in this case turns on the question, differing only in form from that this day decided in No. 34, *Sanford v. Helvering*, whether, in case of an *inter vivos* transfer of property in trust, reserving to the donor power to designate new beneficiaries other than himself, the gift becomes complete at the time of the creation of the trust and subject to the gift-tax imposed by the Revenue Act of 1932.

In December, 1934, respondent created a trust of personal property for his own benefit for life, with remainders over to specified classes of beneficiaries. By the trust indenture he reserved to himself a power to change the beneficiaries of the trust and to prescribe the conditions under which the new beneficiaries should take an interest in the trust, but without any power to increase his own beneficial interest in the trust property.

Respondent paid the gift tax assessed against him with respect to the transfer of the remainder interests upon creation of the trust, and brought the present suit in the district court to recover the tax as illegally collected. Judgment in his favor was affirmed by the Circuit Court of Appeals for the second circuit, 101 F. (2d) 1012, on the authority of *Hesslein v. Hoey*, 91 F. (2d) 954. We granted certiorari May 22, 1939, so that this case might be considered with the *Sanford* case.

The gift tax, § 319, of the 1924 Act, so far as now material, reappeared in § 501, of the 1932 Act, 47 Stat. 169. Other pertinent provisions of the earlier act were reenacted without change of pres-

et seq.  
et seq.

ent moment in §§ 501, 510, 801. The applicable estate tax provisions are § 302(c)(d) of the 1926 Act, 44 Stat. 40, 71, Section 501(e) of the 1932 Act added a new provision that transfers in trust, with power of revocation in the donor, should be taxed on relinquishment of the power. This was repealed by § 511 of the Act of 1934, 48 Stat. 680, because *Burnet v. Guggenheim*, 288 U. S. 280, had declared that such was the law without specific legislation. H. R. No. 704, 73rd Cong., 2d Sess., p. 40; Sen. Rep. No. 558, 73rd Cong., 2d Sess., p. 50.

For the reasons stated in our opinion in the *Sanford* case we conclude that the reserved power in the donor at the time of the creation of the trust rendered the gift incomplete and not subject to the gift tax. As pointed out in our opinion in the *Sanford* case the Treasury regulation under the 1932 Act, Art. III, Regulation 79 (1933 edition), in force when the trust was created, affords no basis for modification of our construction of the statute. Whatever validity the amended regulation of 1936 may have in its prospective operation, we think it is so plainly in conflict with the statute as to preclude its application retroactively so as to subject to tax such transfer as was made by the creation of the trust in 1934. Cf. *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110.

*Affirmed.*

Mr. Justice BUTLER took no part in the consideration or decision of this case.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

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